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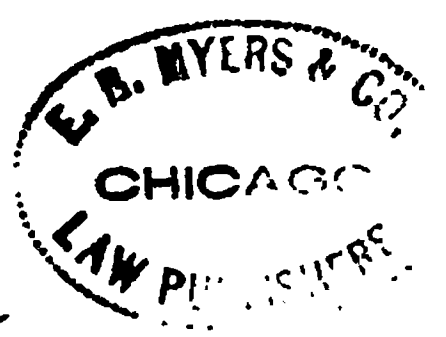
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AMERICAN
RAILROAD AND CORPORATION
REPORTS.

**BEING A COLLECTION OF THE CURRENT DECISIONS OF THE COURTS
OF LAST RESORT IN THE UNITED STATES PERTAINING TO
THE LAW OF RAILROADS, PRIVATE AND MUNICIPAL
CORPORATIONS, INCLUDING THE LAW OF IN-
SURANCE, BANKING, CARRIERS, TELE-
GRAPH AND TELEPHONE COMPA-
NIES, BUILDING AND LOAN
ASSOCIATIONS, ETC.**

EDITED AND ANNOTATED BY
JOHN LEWIS,
AUTHOR OF "A TREATISE ON EMINENT DOMAIN IN THE UNITED STATES."

VOLUME VIII.

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THE EDITOR.

CHICAGO, *May*, 1894.

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AMERICAN RAILROAD AND CORPORATION REPORTS.

STATE v. DES MOINES & K. C. RY. CO.

(Supreme Court of Iowa, February 3, 1893.)

1. RAILROAD COMPANIES. REMOVING STATION. MANDAMUS TO RESTORE. Defendant railroad company, after maintaining a station for several years at a point intermediate two other points, where its line crossed other roads, abandoned such station, and established two others at points equidistant from the two junctions, in order to increase its traffic, and provide greater facilities for the inhabitants of the territory lying between the junctions. Held, that a petition, by the inhabitants of the station abandoned, to compel its re-establishment, based on an order of the railroad commissioners commanding defendant to re-establish such station, was properly dismissed, in that petitioners were not thereby deprived of reasonable facilities to transact business with defendant; and, unless it be shown that such is the case, the railroad commissioners had no authority to interfere with defendant in the management of its property and the location of its stations.

THIS is an action founded upon an order of the railroad commissioners requiring the defendant to re-establish and maintain a station on its line of railroad at a place called "Leslie." The district court, after hearing the testimony of a large number of witnesses, entered a decree dismissing the petition.

John Y. Stone, Att'y Gen., and *Cole, McVey & Cheshire*, for appellant. *Kauffman & Guernsey*, for appellee.

ROTHROCK, J. 1. The defendant is the owner of a railroad which it operates from Des Moines, Iowa, to Cainsville, in the state

of Missouri. It passes through Osceola, the county seat of Clarke county, where it crosses the main line of the Chicago, Burlington & Quincy Railroad. About 14 miles south of Osceola, it crosses the Keokuk & Western Railroad, at a station called "Van Wert." The Keokuk & Western road runs from Keokuk to Van Wert, where it connects with the Humeston & Shenandoah Railroad, which runs west to Shenandoah. The defendant's road was constructed to the points named in 1882, and at that time a station named "Leslie" was located at a point about midway between Osceola and Van Wert. The defendant's railroad is what is called a "narrow gauge," and the evidence shows that, some time after it was constructed, it fell into the hands of a receiver, and was sold to the defendant in March, 1888. Soon thereafter the managing officers of the defendant decided to divide up the territory between Osceola and Van Wert by putting in two stations, instead of one. The plan was to make the stations about equidistant. To accomplish this purpose, it was necessary to abandon or remove the station called "Leslie." A station called "Phillipsburg" was established at a point five miles south of Osceola, and another station called "Green Bay" was established five miles south of Phillipsburg; so that the distances between stations on that part of the line were approximately five miles. The residents in and about Leslie made complaint of this change in the stations, and petitioned the railroad commissioners to make an order that the station at Leslie be re-established as it was before the change was made. An investigation was made by the commissioners, and a majority of them made the order upon which this action is founded. A very large number of witnesses were examined upon the trial in the district court. It is not our purpose to attempt to set out their testimony in this opinion. A careful examination of it has led us to the conclusion that the district court rightly determined that the order was not reasonable and proper. As we view the evidence, the wants of the people residing in the territory between Osceola and Van Wert, and within convenient distance of the defendant's road, are as well or better accommodated with railroad facilities than they would be with one station located at Leslie. Counsel for appellant do not really dispute this proposition. We find the following language in their argument: "If the defendant road has established by the evi-

dence that it has maintained two stations, one at Green Bay and one at Phillipsburg, as they maintained previous to January 1, 1889, the station at Leslie, then we admit that two stations thus maintained would probably accommodate the public along the line of defendant's railway between Osceola and Van Wert at least equal to the one station at Leslie; but we shall show from the record that the stations at Green Bay and at Phillipsburg are mere sidings, and have never been maintained in any proper sense as stations." There is no doubt that there is a large preponderance of the evidence to the effect that more of the patrons of the road can be accommodated with two stations than with one. Indeed, it appears to us that this is a fact which does not require the testimony of witnesses to establish. It is a self-evident fact. There might be a case where, owing to the topography of the county, and the condition of roads and approaches to the stations, the question would be debatable; but there is no such condition of things in this case. It appears from the above extract from the argument of appellant that the complaint is not so much that the station house was removed from Leslie, and the station abandoned, as that the stations at Green Bay and at Phillipsburg are not properly maintained. It will be time enough to determine that question when a formal complaint is made to compel better facilities at those stations. It is true that the stations on the line of this road are not maintained as they are on other lines in this state. It is a narrow-gauge road, and the evidence shows that since 1889 it has been operated at a loss of \$100 a day of actual outlay, without expending anything for maintaining the property. There is nothing in the case which tends to show that the managers of the road had any intention to deprive any one of proper facilities for transacting business with the company. The income of the road did not warrant the maintenance of expensive stations, but demanded the strictest economy. It was thought by the management that, by establishing two stations at points nearer the junction of the other roads named, the defendant would be able to control more traffic, by being nearer to the inhabitants residing in the vicinity of Osceola and Van Wert. It appears to us that the owners of the road should not be interfered with in the management of their property, including the location of their stations,

where, as in this case, there is no competent evidence that any patron of the road has been deprived of reasonable facilities for transacting business with the defendant.

2. Counsel have presented and discussed the question whether, under the statute, the railroad commissioners have the power to order a station established at any point except at the junction of lines of road. We do not determine that question, because it is not necessary to do so in this case. The decree of the district court is affirmed.*

1. Railroad companies—duties as to establishing, maintaining or restoring station.—The rights and duties of railroad companies as to establishing and maintaining stations, and removing or changing the location of stations, is considered in *Mobile & Ohio R. Co. v. People*, (Ill.), 2 Am. R. R. & Corp. Rep. 476, and *Northern Pac. R. Co. v. Territory of Washington*, (U. S.), 5 Am. R. R. & Corp. Rep. 353. See also *Conger v. New York, etc. R. Co.* (N. Y.), 2 Am. R. R. & Corp. Rep. 190.

2. Changing site of depot not an abolishment or disuse of it within statute.—Changing the site of a depot from one place to another on the same town is not abolishing it, within the meaning of acts Miss. 1890, c. 88, § 4, forbidding the abolishment or disuse of any depot, when once established, without the consent of the railroad commission; but such change can only be made when the interests of the railroad company and the public concur in demanding it, and when the new site is not inconvenient or inaccessible. *State v. Ala. & V. R. Co.* 68 Miss. 653 : 9 So. Rep. 469.

The railroad commission having condemned appellee's depot in Vicksburg, and ordered it to build a new one, appellee, at much expense, began erecting one on a new site, the plans being approved by the commission with knowledge that the site was new. Afterwards, on complaint of the city authorities, the commission declared the new site inconvenient, and ordered the work discontinued and the new depot built on the old site. At the time of this order, a street, the closing of which was indispensably prerequisite for the erection of the new depot on the old site, had not been ordered to be closed by the city authorities, nor the property owners' consent given to its closing. The new site, though a few blocks further from the business center, would be more convenient for most persons having freight business with appellee, and for appellee, while it would be more inconvenient for a few merchants in a particular locality, and for local travelers into the city. Held, that having regard to the interests of the railroad company and of the public, the new site was not inconvenient. *Ibid.*

*Reported in 54 N. W. Rep. 461.

FIFTH AVE. BANK v. FORTY-SECOND ST. & GRAND ST.
FERRY R. Co.

(Court of Appeals of New York, February 28, 1898.)

1. CORPORATIONS. FORGED CERTIFICATE OF STOCK. BONA FIDE HOLDER. Before accepting a certificate of stock in a corporation, as security for a loan, the president of a bank sent its confidential clerk to the office of the company to ascertain if the certificate was genuine; and the latter was informed by the secretary and treasurer, in charge of the office, that it was genuine. The name of the president of the corporation had been forged to the certificate by the secretary and treasurer, who was associated in business with the holder, all of which was unknown to the bank. Held, that the bank was a *bona fide* holder of such certificate.

2 EFFECT OF FORGERY BY TRANSFER AGENT. LIABILITY OF CORPORATION. Where the secretary and treasurer of a corporation, who is also its agent for the transfer of stock, and authorized to countersign and issue stock when signed by the president, forges the name of the latter, and fraudulently issues a certificate of stock, the corporation is liable to a bank which has accepted such certificate, in good faith, as security for a loan.

3. EFFECT OF SALE OF STOCK BY PLAINTIFF FOLLOWED BY RESCISSION AFTER DISCOVERY OF FRAUD. The rights of such bank are not affected by the fact that it sold such stock by authority of the person from whom it received it, and after the discovery of the forgery refunded to the purchaser the money paid, and received the certificate back.

ACTION by the Fifth Avenue Bank of New York against the Forty-second Street & Grand Street Ferry Railroad Company for damages caused by defendant's refusal to transfer on its books certain stock to plaintiff, or to recognize plaintiff as a stockholder. From a judgment of the general term (17 N. Y. Supp. 826) overruling defendant's exceptions, denying its motion for a new trial, and directing judgment for the plaintiff, defendant appeals.

Freling H. Smith, for appellant. *Edward C. James*, for respondent.

MAYNARD, J. In September, 1885, the plaintiff, a domestic banking corporation, loaned one Hofele \$15,000 upon his individual note, payable in three months, and secured by the pledge of an instrument which upon its face purported to be a certificate for 160 shares of

stock of the defendant, a domestic railroad corporation having its office and principal place of business in the same city with the plaintiff. It was subsequently discovered that this certificate was spurious, and that the signature thereto of the defendant's president had been forged by one Eben S. Allen, its secretary, who was also its treasurer and transfer agent, and who had in these capacities signed and countersigned the certificate, and delivered it to Hofele, who was his partner in business, for the purpose of raising money upon it, to be used in the firm undertaking. We are required upon this appeal to determine how far the defendant company is liable for the loss sustained by the plaintiff in consequence of this fraudulent and criminal act of one of its principal officers.

The good faith of the plaintiff in the transaction by means of which it became possessed of the forged certificate seems to be satisfactorily established. Hofele was a stranger to the officers of the bank, and they had no knowledge of his business relations with Allen, or that the latter was in any way interested in the proposed loan. Before acting upon Hofele's application for a discount, the plaintiff's president sent its confidential clerk to the office of the defendant with the certificate, who, pursuant to instructions, showed it to the person in charge of the office, who was then unknown to the clerk, but who proved to be Allen, its secretary and treasurer, and who was asked if it was genuine, and all right, and if Hofele was a stockholder of the company, to which an affirmative reply was given, and a description of Hofele, from which the bank might identify him as the person who had presented the certificate, and sought the loan upon the strength of it. The clerk reported the result of the interview to the plaintiff's officers, who thereupon discounted Hofele's note for the sum named, payable in three months, and accepted the certificate as collateral security, in the usual form, for its payment, and for all other present or future demands of the bank against him. The note was renewed from time to time, and increased in amount, and some smaller notes given, until his indebtedness amounted to \$35,000 and upwards. Meanwhile the plaintiff had taken as additional security a like certificate for fifty shares, to which the signature of the defendant's president had also been forged, and which was first received as security for a loan of \$5,000. This

loan was afterwards consolidated with the other loans, and became a part of the total indebtedness, for which both certificates were held as security. Upon the pledge of the fifty-share certificate the plaintiff made no inquiries of the defendant, or of any of its officers, with reference to its genuineness. In July, 1889, Hofele ordered the plaintiff to sell the two certificates, and signed the usual blank transfer or power of attorney for that purpose upon the back of them. When they were first hypothecated, he had executed a separate power of attorney, authorizing plaintiff to sell and transfer them in case of default in the payment of the loans. The certificates were sold by plaintiff's brokers, and the net sum of \$43,890 received, and placed to Hofele's credit, and his indebtedness charged to his account, leaving an apparent balance due him of \$8,479. When the certificates were presented by the purchasers at the office of defendant for transfer, it was refused upon the ground that they were forged and spurious, and the treasurer and transfer agent wrote across their face, in red ink, the words "No good," and added their official signatures to the statement. The plaintiff then refunded to the purchasers the amount paid upon the sale of the certificates, and took an assignment from them of all rights of action which they had against the defendant; and, upon the refusal of the defendant to recognize the certificates as valid evidences of title to its shares of stock, this action was brought, in which the plaintiff has recovered for its loss on account of the invalidity of the 160-share certificate, and the defendant alone has appealed.

With respect to this certificate, we fail to discover any omission on the part of the plaintiff which would impeach its character as a *bona fide* holder. It made inquiry at the office of the defendant, where its books and records were kept, and of the officer in charge, whose duty it was to furnish correct information upon the subject; and it had no reason to suspect that the assurances it received were misleading, or false, or that the officers of the defendant had entered into a conspiracy with Hofele to defraud the public. It resorted to the only source of verification of the truth of Hofele's statements which was readily accessible, and it exercised all the care and vigilance which a prudent man would be expected to exhibit in the ordinary course of the business in which it was engaged. There was no circumstance proven

which required a display of greater diligence. Nor were the rights of the plaintiff affected by the sale of the certificates, and their redelivery to the plaintiff upon a refund of the proceeds of the sale to the purchasers. Though nominally sold on the account of Hofele, the plaintiff was the real party in interest in the transaction. There was an implied guaranty of the genuineness of the certificates, which the vendor might be required to make good; and as the plaintiff had received the fruits of the transaction, the consideration of which had failed, it could not lawfully withhold them from the purchasers when restoration was demanded. The purchasers were also *bona fide* holders of the certificates, and the plaintiff, by their assignment, acquired the right to the enforcement of whatever remedies they might have in that capacity against the defendant, although it was then aware of their fraudulent issue. While certificates of stock in railroad and other business corporations do not possess the qualities of commercial paper, in the full sense of the term, yet, as evidences of title, when the transfer indorsed thereon is signed in blank by the shareholder, they become, in effect, so far as the public is concerned, as if they had been issued to bearer. They are then readily transferable by delivery, and have an element of negotiability which renders them an important factor in the financial and commercial transactions of the country. They may be, and are frequently, listed upon the stock exchanges, and their sales represent a large proportion of the daily business of these bodies. The plaintiff must, therefore, be accorded whatever advantage belongs to a holder in good faith of a chose in action of this character, and we have only to consider how far the defendant is responsible for the acts and representations of its officers, by means of which Hofele was enabled to obtain the plaintiff's money upon the faith of paper apparently valid, but in fact worthless.

The defendant was incorporated under the general railroad law, originally with a capital of \$600,000, afterwards increased to \$750,000, all of which had been issued, excepting twenty shares, before 1870. Its books relating to the issue and transfer of stock consisted of a certificate book, a transfer book, and a stock ledger, which were all kept by the secretary, and were in his immediate custody; but in his official capacity and work he was subject to

the supervision of the president, and all the officers were under the general control and management of a board of directors. It is apparent from the evidence that the secretary was *ex officio* the transfer agent of the company. At least, from 1868 to the present time, the secretary had acted as such agent; and there is no provision in the by-laws for the separate appointment of a transfer agent, and the only reference to such an officer is in a single paragraph in § 15, where it is provided that "all certificates shall be issued and signed by the president and treasurer, and countersigned by the transfer agent, under such other regulations as the board of directors or finance committee may from time to time prescribe." Whether the secretary was, by virtue of his office, transfer agent, is not material; but the fact remains that, so far as the evidence discloses anything upon the subject, he always discharged the duties of that office, and in the performance of the work was fitly characterized as the transfer agent of the company. When stock was issued, either in payment of an original subscription, or upon its transfer from one person to another, the engraved certificate was taken from the certificate book, and filled up by the secretary, presented to the president and treasurer, who signed it, and it was then countersigned by the secretary, as transfer agent, and sealed by him with the seal of the corporation, and delivered to the stockholder or transferee named in it. The secretary at the same time inserted the proper data in the stub remaining in the certificate book, and made the necessary entries in the transfer book and the stock ledger. The certificate received by plaintiff from Hofele had been taken from the certificate book. It appeared upon its face to be perfect and regular in every respect. It had the name of the president and treasurer signed to it, was countersigned by the transfer agent, and bore the impress of the corporate seal. It recited that Hofele was the owner of 160 shares, of \$100 each, of the capital stock of the company, contained the usual provisions in regard to the mode of transfer, and declared that no certificate should bind the company unless signed by the president, and countersigned by its treasurer and transfer agent. The *in testimonium* clause asserted that the defendant had caused that particular certificate to be signed by its president, and countersigned by its treasurer and transfer agent, and sealed with

its corporate seal, February 6, 1885. It is very clear that under the regulations adopted by the defendant, and pursuing the mode of procedure which it had prescribed, the final act in the issue of a certificate of stock was performed by its secretary and transfer agent, and that when he countersigned it, and affixed the corporate seal, and delivered it, with the intent that it might be negotiated, it must be regarded, so long as it remained outstanding, as a continuing affirmation by the defendant that it had been lawfully issued, and that all the conditions precedent upon which the right to issue it depended had been duly observed. Such is the effect necessarily implied in the act of countersigning. This word has a well-defined meaning both in the law and in the lexicon. To countersign an instrument is to sign what has already been signed by a superior, to authenticate by an additional signature, and usually has reference to the signature of a subordinate, in addition to that of his superior, by way of authentication of the execution of the writing to which it is affixed; and it denotes the complete execution of the paper. *Worcester Dict.* When, therefore, the defendant's secretary and transfer agent countersigned and sealed this certificate, and put it in circulation, he declared, in the most formal manner, that it had been properly executed by the defendant, and that every essential requirement of law and of the by-laws had been performed to make it the binding act of the company. The defendant's by-laws elsewhere illustrate the application of the term, when used with reference to the signatures of its officers. In section 10 it is provided that all moneys received by the treasurer should be deposited in bank to the joint credit of the president and treasurer, to be drawn out only by the check of the treasurer, countersigned by the president. If the president should forge the name of the treasurer to a check, and countersign it, and put it in circulation, and use the proceeds for his individual benefit, we apprehend it would not be doubted that this would be regarded as a certificate of the due execution of the check, so far as to render the company responsible to any person who innocently, and in good faith, became the holder of it. This result follows from the application of the fundamental rules which determine the obligations of a principal for the acts of his agent. They are embraced in the comprehensive statement of Story in his work on Agency (9th ed., § 452), that the principal is to be "held liable to

third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances or misfeasances and omissions of duty of his agent in the course of his employment, although the principal did not authorize or justify or participate in, or, indeed, know of such misconduct, or even if he forbade the acts, or disapproved of them. In all such cases the rule applies, respondent superior, and is founded upon public policy and convenience; for in no other way could there be any safety to third persons in their dealings, either directly with the principal, or indirectly with him, through the instrumentality of agents. In every such case the principal holds out his agent as competent and fit to be trusted, and thereby, in effect, he warrants his fidelity and good conduct in all matters within the scope of the agency."

It is true that the secretary and transfer agent had no authority to issue a certificate of stock except upon the surrender and cancellation of a previously existing valid certificate, and the signature of the president and treasurer first obtained to the certificate to be issued; but these were facts necessarily and peculiarly within the knowledge of the secretary, and the issue of the certificate in due form was a representation by the secretary and transfer agent that these conditions had been complied with, and that the facts existed upon which his right to act depended. It was a certificate apparently made in the course of his employment, as the agent of the company, and within the scope of the general authority conferred upon him; and the defendant is under an implied obligation to make indemnity to the plaintiff for the loss sustained by the negligent or wrongful exercise by its officers of the general powers conferred upon them. *Griswold v. Haven*, 25 N. Y. 599; *Railroad Co. v. Schuyler*, 34 N. Y. 30; *Titus v. President, etc., of Turnpike Road*, 61 N. Y. 237; *Bank of Batavia v. New York, L. E. & W. R. Co.*, 106 N. Y. 199; 12 N. E. Rep. 433.

The learned counsel for the defendant seeks to distinguish this case from the authorities cited because the signature of the president to the certificate was not genuine. But we cannot see how the forgery of the name of the president can relieve the defendant from liability for the fraudulent acts of its secretary, treasurer, and transfer agent. They were officers to whom it had intrusted the authority to make the final declaration as to the validity of the

shares of stock it might issue; and where their acts, in the apparent exercise of this power, are accompanied with all the indicia of genuineness, it is essential to the public welfare that the principal should be responsible to all persons who receive the certificates in good faith, and for a valuable consideration, and in the ordinary course of business, whether the indicia are true or not. 2 Beach Priv. Corp. p. 790; Bank v. Aymar, 3 Hill, 262; Jarvis v. Beach Co., 53 Hun, 362; 6 N. Y. Supp. 703; Tome v. Railroad Co., 39 Md. 36; Railroad Co. v. Wilkens, 44 Md. 28; Western M. R. Co. v. Franklin Bank, 60 Md. 36; Com. v. Bank, 137 Mass. 431; Holden v. Phelps, 141 Mass. 456; 5 N. E. Rep. 815; Beach Co. v. Harnad, 27 Fed. Rep. 486; Shaw v. Port Phillip, etc., Co., 13 Q. B. Div. 103. The rule is, we think, correctly stated in Beach on Private Corporations, (volume 2, § 488 p. 791): "When certificates of stock contain apparently all the essentials of genuineness, a *bona fide* holder thereof has a claim to recognition as a stockholder, if such stock can legally be issued, or to indemnity, if this cannot be done. The fact of forgery does not extinguish his right, when it has been perpetrated by or at the instance of an officer placed in authority by the corporation, and intrusted with the custody of its stock books, and held out by the company as the source of information upon this subject."

Having reached the conclusion that the defendant is liable for the representations of its officers, appearing upon the face of its certificate, over their official signature, and under the seal of the corporation, we do not deem it necessary to consider the effect of the oral representations made at the office of the company to the plaintiff's clerk, except so far as they bear upon the question of the good faith of the plaintiff in the acquisition of the certificate. The judgment and order must be affirmed, with costs. All concur.*

CORPORATIONS—LIABILITY WITH RESPECT TO FORGED, FRAUDULENT, VOID AND IRREGULAR CERTIFICATES OF STOCK.

1 The different kinds of false, fraudulent and irregular certificates.—The different sorts of false, fraudulent and irregular certificates of

*Reported in 187 N. Y. 231; 83 N. E. Rep. 878.

stock, by means of which persons have been defrauded or damnified, and for which fraud or damage it has been sought to hold the corporation liable, may be grouped into the following classes :

1. Certificates of stock, having the genuine signatures of the proper officers, and the genuine seal of the corporation, but fraudulently issued by an officer or agent of the corporation, having authority to certify and issue like certificates in the ordinary course of business.

2. Certificates fraudulently issued by an officer or agent, having authority to certify and issue genuine certificates identical in form, to which has been forged the name of some other officer or agent.

3. Forged or fraudulent certificates issued by an officer or agent having authority to certify and issue certificates, but which purport to be the act of former officers.

4. Forged certificates issued by an officer having authority to sign but not to issue certificates.

5. Certificates bearing the genuine signatures of the proper officers and the genuine seal of the corporation, but false and fraudulent in fact, and put in circulation by one having no authority to certify or issue certificates.

6. Certificates, regular in form and with genuine signatures and seals, but fraudulently issued in the name of a fictitious person.

7. Certificates surrendered for cancellation and fraudulently reissued.

8. Certificates, issued by authority of the corporation, in good faith, but void or irregular by reason of some mistake of law or fact.

Doubtless there may be other forms of fraudulent certificates, but the foregoing appear to be the only ones that have found their way into the courts.

2. Liability with respect to certificates of stock having the genuine signatures of the proper officers and the genuine seal of the corporation, but fraudulently issued by an officer or agent having authority to certify and issue such certificates in the ordinary course of business.—Such a certificate is void in the hands of one who took with knowledge of the facts or with notice, actual or constructive, of its fraudulent character. No question of the liability of the corporation can arise, except with reference to one who has given value for the certificate in good faith. The question is: What is the liability of the corporation to such a person.

This question first underwent careful consideration in what are known as the Schuyler frauds, out of which grew the cases of *Bridgport Bank v. New Y. & N. H. R. Co.*, 30 Conn. 231 (1861); *Mechanics' Bank v. New York & N. H. R. Co.*, 13 N. Y. 599 (1856); *New York & N. H. R. Co. v. Schuyler*, 17 N. Y. 592 (1858); *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30 (1865). Robert Schuyler was a director and also president and transfer agent of the New York & New Haven Railroad Co. He was also a member of the firm of R. & G. L. Schuyler, which dealt largely in the stock of the company, and had large transactions with the company itself. The capital stock of the company was \$2,000,000, afterwards increased to \$3,000,000. In course of a series of years, and prior to July 8, 1854, Schuyler issued false and fraudulent certificates of stock to the amount of nearly 20,000 shares, all of which was in excess of the capital stock of the company. (34 N. Y. p 57.) The by-laws of the company provided that the stock should be transferable only on the books of the com-

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pany, upon the surrender of the certificate representing the shares to be transferred, and this was also expressed on the face of the certificate. In the case of *Mechanics' Bank v. New York & N. H. R. Co.*, 13 N. Y. 599, it appeared that Schuyler issued a certificate for eighty-five shares to one Kyle, which was wholly fraudulent. Kyle borrowed money on the certificate from plaintiffs for the use of Schuyler. The plaintiffs acted in good faith and in ignorance of Schuyler's interest in the loan. After the fraud was discovered the plaintiffs demanded a transfer of the stock, which was refused. Thereupon they brought suit against the corporation to recover the damages they had sustained. The court held that the certificate was void because the corporation had no power to issue it, and also because it had never authorized their issue; that the certificate was not negotiable, and that plaintiffs were, therefore, chargeable with notice of the authority of Schuyler, as transfer agent, which was shown to be limited to the making of transfers upon the books of the company upon the surrender of the certificate representing the shares to be transferred; that the surrender of the old certificate was a condition precedent to the authority of Schuyler to issue a new one, the existence of which the plaintiffs were bound to ascertain at their peril, and that, as this condition did not, in fact, exist, the defendant was not liable.

Following this decision the railroad company filed a bill against the holders of the spurious certificates of stock and prayed for their cancellation. In *New York & N. H. R. Co. v. Schuyler et al.*, 17 N. Y. 592, some questions of practice were settled in this case. Afterwards the case was tried upon its merits and a decree made cancelling the spurious certificates, and also awarding damages to various defendants, who were holders of such certificates. The company was held liable to those who had taken the certificates in good faith on two grounds; *first*, that the board of directors had been negligent in failing to examine the books of the company and to exercise a proper supervision over its affairs, whereby Schuyler had been enabled to carry on his frauds, and that the corporation should be estopped to deny his authority to do the acts in question (see pages 57-61); and, *second*, on the ground of agency. In this respect the evidence disclosed that a much larger authority had been confided to Schuyler than appeared in the *Mechanics Bank Case*. In that case it only appeared that he was authorized to issue certificates of stock, on a transfer from one stockholder to another upon the books and on the surrender of the previous certificate. In the later case, in referring to the authority of Schuyler, the court says: "It now appears that the agent, in addition to the powers thus stated (*i. e.*, in the *Mechanics Bank Case*), had authority also to issue certificates in precisely the same form, to the original subscribers for the stock, and to some extent did so; that he had authority to dispose of the stock of the company not taken by the original subscribers (of which there was a large amount), and issue certificates in the same form to the purchasers; that he had authority to dispose of certain forfeited shares, and in such case issue like certificates; that he had authority to receive transfers to himself of stocks on behalf of the company, and transfer the same to purchasers and issue like certificates to them; that before the increase of the capital to 30,000 shares, he did issue to his own firm a large number of false certificates which became the basis of transfers on the books to third parties,

and by some arrangement were absorbed into the enlarged capital as genuine stock; that he acted to some extent as financial agent of the company, and through his firm raised large amounts, indiscriminately, on genuine and spurious certificates of stock, which were paid out on the check of the firm on behalf of the company and on its construction account; that to him was intrusted the keeping of all the stock accounts of the company and its dealers at the New York office, and in those accounts be entered all his transactions, both false and genuine; that the books were kept closed to dealers; that his management of the affairs of the office, and of all these various matters, was never investigated or questioned." (34 N. Y. 61, 62.) After commenting on these facts the court says: "In this view of the extent of the authority with which Schuyler was clothed by the company, either by direct appointment or by recognition and ratification, or by actual enjoyments of the fruits of his acts, or by long acquiescence therein from which a presumption or implied agency arises, I have come to the conclusion that the issuing of the certificates by him must be held to be within the scope of the real or apparent authority which he possessed; and the remedy of the defendants is not prejudiced by the fact that he used or intended to use the avails for his own purpose. In short, they stand precisely in respect to the remedy where they would if the board of directors had issued the same certificates in fraud of their powers under the law, and obtained the defendants' moneys thereon." (34 N. Y. p. 64.)

But the court went further and held that the company would be liable, though the only authority vested in Schuyler was to issue certificates when a transfer was made on the books and the old certificate surrendered. It was held that the condition, which alone gave him authority to issue a certificate, was an extrinsic fact peculiarly within the knowledge of the agent, that the issue of a certificate was an implied representation by him that the condition had been fulfilled, and that the company was estopped to deny the truth of such implied representation, as to those who had relied thereon to their prejudice. (34 N. Y. 65-73). The general principle involved is stated as follows: "When the principal has clothed his agent with power to do an act upon the existence of some extrinsic fact necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person dealing with the agent in entire good faith pursuant to the apparent power, may rely upon the representation, and the principal is estopped from denying its truth to his prejudice." (34 N. Y. p. 73). "In this view," says the court, "I see no ground upon which the plaintiffs can, in this case, be permitted to deny that Schuyler was acting within the scope of his authority in issuing the false certificates; and they are therefore to be treated as though issued by the board of directors."

In the case of *Bridgeport Bank v. New York & N. H. R. Co.*, 30 Conn. 281, the plaintiff bank took of R. & G. L. Schuyler, as collateral security, two certificates of stock in the defendant company, for 90 shares. At that time it appeared that R. & G. L. Schuyler held 160 shares of genuine stock and 400 or more shares of spurious stock. These certificates the bank held, without having the stock transferred on the books, until the frauds of Schuyler were discovered. A transfer having then been refused, the bank brought suit for damages. The court held that as the certificates were in due form and issued

by the proper officer, they were *prima facie* valid in the hands of a *bona fide* holder, that, in the absence of evidence it must be presumed that the firm of R. & G. L. Schuyler had genuine stock to which the certificates could apply, and that the burden was on the company to show that the certificates were spurious and that the Schuylers had no genuine stock to which they could apply. The court found that the company had failed to show that the certificates in question were spurious and affirmed a judgment for the plaintiff. The question of the liability of the company in case the certificates were proven to be spurious was not presented or decided.

In *Allen v. South Boston R. Co.*, 150 Mass. 200; 22 N. E. Rep. 917, the facts are very similar to those in the Schuyler cases. Reed was treasurer of the defendant company and had authority to sign, seal and issue certificates of stock, previously signed by the president, but only upon a transfer on the books of the company and surrender of the old certificate. The president was in the habit of leaving certificates signed in blank with Reed. The latter filled out and issued the certificates in question, fraudulently and without any transfer or surrender of prior certificates. They bore the genuine signatures of the proper officers and had all the indicia of genuine certificates. The plaintiffs were found to be innocent holders thereof for value, and the corporation was held liable to them for the damages they had sustained. The agreed facts were held to show "gross carelessness on the part of the president in signing certificates in blank, and negligence on the part of the directors in not examining the books and discovering the fictitious transfers of stock made by Reed." Counsel for the corporation admitted, and the court declared, the general rule to be "that a corporation is estopped to deny the validity of certificates issued in proper form under its seal, and duly signed by the officers authorized to issue certificates, if they are held by persons who took them for value without knowledge or notice that they had been fraudulently issued." As to the grounds of liability the court says: "The ground on which a corporation is liable to a *bona fide* purchaser for value of false certificates of its stock issued under its seal, signed by the proper officers, and apparently genuine, is that the certificates are statements by the corporation of facts which it is its duty to know, and which cannot well be known to the purchaser." And again: "The present cases, we think, fall within the principle, that, where one of two innocent persons must suffer a loss from the fraud of a third, the loss must be borne by him whose negligence enabled the third person to commit the fraud."

In *Willis v. Fry*, 18 Phila. 83, which was a similar case and similarly decided, the court says: "It is well settled that one who, as a purchaser or lender, gives value on the faith of a certificate of stock authenticated by the seal of the corporation and the signatures of the proper officers, acquires an equitable title and may require the corporation to transfer the stock to him, or respond in damages for the default. It is not a sufficient answer to such a demand that the certificate was fraudulently issued, because corporations are not less than natural persons answerable for the conduct of their agents in the business entrusted to their care. Nor is it necessarily conclusive against such a purchaser that the party from whom he bought was cognizant of or participated in the fraud. If a certificate of stock is not a negotiable instrument, it is a written declaration that the holder has a definite share in the capital or profits

of the concern, which, though delivered to him, is intended for circulation and virtually addressed to all the world, and third persons who are misled by such an instrument, may justly require that the loss shall fall upon the corporation and not on them." This decision was afterwards affirmed by the supreme court. See p. 44 of the report.

The question received very elaborate consideration in a series of cases in the courts of Cincinnati growing out of the frauds of one George E. Doughty, secretary of the Cincinnati, New Orleans & Texas Pac. Ry. Co. Certificates were required to be signed by the president and secretary and sealed with the corporate seal. The president was in the habit of signing certificates in blank and leaving them with the secretary. Between the dates of October 12, 1881, and May 25, 1882, when Doughty died, the latter issued a large number of fraudulent certificates to himself, which he used as collateral security for loans obtained of various parties. These certificates bore the genuine seal of the corporation and the genuine signature of the president. Prior to these frauds the full amount of the authorized capital stock of the corporation had been issued. Doughty was a subscriber for 650 shares of stock, and from time to time became the owner and holder of other genuine stock. After the death of Doughty his frauds were discovered, and various suits were brought by holders of stock issued to Doughty, which suits appear to have been tried on the issue, whether the stock in question was genuine stock or spurious. *Citizen's National Bank v. Cincinnati, etc., R. Co.*, 11 Weekly L. B. 86; *Cincinnati, etc., R. Co. v. Rawson*, 16 Weekly L. B. 423; *Perin v. Cincinnati, etc., R. Co.*, 18 Weekly L. B. 382. Afterwards the railroad company filed a bill in equity against the various holders of the Doughty certificates, to have the genuine ones ascertained, the spurious ones canceled, and the rights of the parties settled. The bill was held good on demurrer by the general term of the superior court, in *Cincinnati, etc. R. Co. v. Citizens National Bank*, 23 Weekly L. B. 248. In a trial upon the merits, the trial court held that the holders of the spurious certificates had no claim against the corporation, for the reason that the certificates were issued to Doughty himself and that fact put them upon notice. 24 Weekly L. B. 198. On appeal to the general term this decision was reversed, the court holding that the corporation was negligent in not exercising a proper supervision over the secretary and in not making or providing for any examination of his books or accounts, that this negligence enabled the secretary to commit the frauds in question and was therefore the proximate cause of the frauds, and that the corporation was liable therefor. It was further held that the fact of the certificates being issued to Doughty was not notice of any irregularity and did not put the holders upon inquiry. *Citizens National Bank v. Cincinnati, etc., R. Co.*, 29 Weekly L. B. 15. The opinion in this case presents a very full and elaborate discussion of the various questions, direct and collateral, involved in the decision.

The following cases are also directly in point, and sustain the liability of the corporation in such cases. *Tome v. Parkersburg Branch R. Co.*, 39 Md. 36; *Baltimore & O. R. Co. v. Wilkins*, 44 Md. 11, 27, 28; *Titus v. Turnpike Road*, 61 N. Y. 237; affirming 5 Lans. 237; *Bank of Kentucky v. Schuylkill Bank*, 1 Parsons' Select Cas. 180; *People's Bank v. Kurtz*, 99 Penn. St. 344.

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As a result of the authorities, we think it may be stated that a corporation will be liable, as to certificates of the first class, to one who has given value therefor, without notice of the fraud or knowledge of any fact to put him upon inquiry. Nor do we understand that there are any cases to the contrary, except that of *Mechanics' Bank v. New York & N. H. R. Co.*, 18 N. Y. 599, which has been virtually overruled. The case of *Holbrook v. Faquier & Alex. T. Co.*, 3 Cranch C. C. 425, is also a possible exception, but the case is obscure and may be distinguished. There is possibly some conflict of authority as to what will be sufficient to affect one with notice of the fraud in such cases. This conflict, if any there is, arises chiefly with reference to the effect to be given the words usually found in a certificate, that the stock represented by it is transferrable only on the books of the company on surrender of the certificate. See *Moore v. Citizens' National Bank*, 111 U. S. 156; *Allen v. South Boston R. Co.*, 150 Mass. 200; 22 N. E. Rep. 917; *Farrington v. South Boston R. Co.*, 150 Mass. 406; 28 N. E. Rep. 109; *Hill v. C. F. Jewell Pub. Co.*, 154 Mass. 172; 28 N. E. Rep. 142. This question and these cases will be considered later on.

3. Liability with respect to certificates fraudulently issued by an officer or agent having authority to certify and issue genuine certificates identical in form, to which has been forged the necessary signatures other than his own.—It is manifest that this case does not differ from the first case already considered, except in the fact that the officer or agent issuing the certificate, instead of using a form previously signed in blank, or procuring the other necessary signatures by fraud or artifice, deliberately forges such names to the certificate. There seems to be no reason why the liability of the corporation should be different in this case than in the other. The fact that the fraud and wrong of the agent is greater should not make the liability of the corporation less, when in all other respects the act is essentially the same. In *Tome v. Parkersburg Branch R. Co.*, 89 Md. 86, the plaintiff loaned money to Rich & Co. on certificates of stock in the defendant company, which were issued directly in the name of the plaintiff. At that time P. G. Winkle was president of the company and John L. Crawford, treasurer and transfer agent. The certificates in question were fraudulently issued by Crawford, and the money borrowed by Rich & Co. was for his benefit. The plaintiff, however, knew nothing of these facts. Winkle was in the habit of signing certificates in blank and leaving them with Crawford to be used as occasion required. It was a disputed question whether the certificates in question had the genuine signature of Winkle or whether his name had been forged thereto by Crawford. The court disposed of this case on the latter assumption. The issuing of the certificate was held to be within the transfer agent's apparent authority, and the corporation was held liable to the plaintiff who had advanced his money on the certificates in good faith. "It is essential to public welfare," says the court, "that where the acts of acknowledged agents are accompanied with all the *indicia* of *genuineness*, and issued for a valuable consideration, the principal should be responsible, whether the *indicia* are true or not. Such liability would conduce to greater vigilance on the part of the principal, greater fidelity in the agent, and greater security to all dealing with them."

On the bearing of the fact that the president's signature was forged, the

court says: "If the principal is responsible for the frauds of his agent, as seems to be settled by the foregoing authorities, it cannot be material what shape the fraud assumes. It would be illogical to suppose that the liability of the principal is lessened by the magnitude of the fraud; that the greater the breach of trust on the part of the agent, the less the responsibility of the employer. Every species of *crimen falsi* not accompanied with force, theft, forgery and perjury, are only frauds of a deeper dye. To exonerate the principal because the fraud of his agent amounted to a felony, would violate the reason of the rule, '*respondent superior*,' deprive innocent third parties of all indemnity, expose them to the risks of fraudulent devices, most dangerous, because most difficult to detect, and leave them without any protection other than the fear of prosecution and punishment." pp. 84-85.

This decision was fully approved in the subsequent case of Baltimore & O. R. Co. v. Wilkins, 44 Md. 11, in which the court, referring to the former decision, says: "These cases were carefully considered, and we there determined that the corporation was responsible for the acts of its treasurer and transfer agent, who surreptitiously and fraudulently issued for his own benefit, false and forged certificates of stock of the company, and passed them off upon the commercial public who advanced money on the pledge of them, and received, treated, and acted upon them as genuine. This treasurer and transfer agent was made by the company, the custodian of the ledger and other books relating exclusively to the ownership and transfer of its capital stock; he was authorized to prepare and countersign all certificates of stock to be issued, and to affix the company's seal (which was entrusted to his keeping and placed in his office), to all such certificates when signed by the president; he was, in fact, constituted the executive officer of the corporation with large discretionary powers, and was held out by the company to the public as the proper party from whom information as to the ownership of its stock was to be ascertained, and in fact *as the source* of information on that subject. In this way the public were by the acts of the corporation exposed to the risks of fraudulent devices most dangerous because most difficult to detect."

Precisely the same question is passed upon, with the same result, in the principal case, where the court says: "We cannot see how the forgery of the name of the president can relieve the defendant from liability for the fraudulent acts of its secretary, treasurer and transfer agent. They were officers to whom it had intrusted the authority to make the final declaration as to the validity of the shares of stock it might issue; and when their acts, in the apparent exercise of this power, are accompanied with all the indicia of genuineness, it is essential to the public welfare that the principal should be responsible to all persons who receive the certificates in good faith, and for a valuable consideration, and in the ordinary course of business, whether the indicia are true or not."

The same conclusion was reached in Shaw v. Port Phillip Gold Mine Co., 13 Q. B. D. 103. Certificates of stock in the defendant corporation were required to be signed by a director and by the secretary and accountant and sealed with the corporate seal. It was the duty of the secretary to procure the due execution of certificates and to issue them to the persons entitled thereto. One J. W. Purchase was both secretary and accountant. He fraudulently is-

sued a certificate in regular form to one G. to which the name of a director was forged. The plaintiff advanced money on the faith of the certificate, and it was held that the corporation was liable to him. The court distinctly holds that it makes no difference whether the fraud is carried out by means of forgery or otherwise, when it is perpetrated by the officer, who is authorized to complete and issue certificates. "It was argued by counsel for the defendants," says Mathews J., "that the fact that the certificate was a forgery prevented their being liable for the act of their agent but he failed, as it appeared to me, to establish any difference for this purpose between a fraud carried out by means of forgery and any other fraud."

See also *Western Maryland R. Co. v. Franklin Bank*, 60 Md. 36, post § 5.

4. Liability with respect to forged or fraudulent certificates issued by an officer or agent, having authority to certify and issue certificates but which purport to be the act of former officers.—

This question is passed upon in *Mutual Life Ins. Co. v. Forty-second St. & Grand St. Ferry R. Co.*, (Supreme Court, General Term) 26 N. Y. S. 545. There was no dispute about the facts which were as follows: For some time prior to and on the 3d day of February, 1883, John Green was president, Charles Curtiss was treasurer, and Eben S. Allen was secretary and transfer agent of the defendant. Prior to this time, Green signed, as president, certain blank certificates of stock of the defendant, one of which is the subject-matter of this action, and handed the same to Curtiss, the treasurer, who shortly after delivered the same to Allen, who thereafter kept them in his private drawer. In January, 1886, Allen took one of said blank certificates signed by Green as president, and filled out the same, dating it February 3, 1883, numbering it 976, and stating the number of shares which it represented to be 229, and that the same belonged to F. W. Hofele, and writing the name of Charles Curtiss opposite the printed word "treasurer" upon said certificate, without the knowledge or authority of said Curtiss, and below writing his name, Eben S. Allen, opposite the words "transfer agent." This certificate Allen delivered to said F. W. Hofele. Green had ceased to be president of the defendant, and Curtiss had ceased to be the treasurer, in April, 1883. When the said certificate was filled out in January, 1886, as above stated, Charles Curtiss was president, and Allen was treasurer, secretary, and transfer agent, of the defendant.

The issuance of this certificate was never authorized by the defendant, but the same was fraudulently and feloniously issued by Allen, and neither the defendant nor any of its officers, except Allen, had any knowledge or information of such issuance until August, 1889, when the plaintiff demanded the transfer of the stock purporting to be represented by such certificate. After the receipt by Hofele of such certificate, he applied to the American Exchange Bank for a loan of \$30,000 upon his note, and tendered this certificate as collateral security. The bank thereupon, and before making the loan, made inquiry at the defendant's office as to the genuineness of the certificate, and was informed by Allen, who was treasurer, secretary, and transfer agent, and had charge of the issuance of stock, that it was genuine. Upon receiving this information the bank made the loan of \$30,000 upon Hofele's note, taking said certificate as collateral. Subsequently, while the loan made by the American

Exchange Bank remained unpaid, one Grant, acting in his own name, but really representing Hofele, applied to the plaintiff for a loan of \$33,000, and offered to give as collateral security 229 shares of defendant's stock, which the plaintiff agreed to take. Afterwards, Grant, accompanied by a messenger from the American Exchange Bank, who brought the certificate of stock held by the bank as collateral to the loan of Hofele, came to plaintiff's place of business, and, Grant, having made his note for \$33,000, the same, with the certificate in question, was delivered to the plaintiff, and it issued its check for the amount of the loan, which Grant then and there indorsed to the American Exchange Bank, and delivered to the messenger, and subsequently received back Hofele's note, and a certificate to Hofele's order, for the difference between Hofele's note and the amount received from the plaintiff, less \$320 paid in money. Before making this loan to Grant, the plaintiff inquired of the American Exchange Bank what it knew as to the certificate, and the information previously received by the bank from the office of the defendant was communicated. The loan by plaintiff was renewed from time to time, no part thereof having been paid. Subsequently, the plaintiff demanded a transfer of the stock, but such transfer was refused, and thereupon this action was brought to recover the damages sustained. The cause having been tried before a referee, and he having reported for a dismissal of the complaint, from the judgment entered upon such report, this appeal is taken.

Upon these facts the court says: "Two questions seem to be presented, which it is necessary to consider. The first is, whether the defendant is bound by the representations contained in the certificate itself issued by its duly authorized agent; and, secondly, whether the plaintiff in this action is entitled to any benefit from the representations made to the American Exchange Bank at the office of the company as to the genuineness of this certificate prior to the making of the loan to Hofele."

Both parties relied upon the principal case, and after an extended review of that case, the court concludes as follows upon the first point: "The whole scope and reasoning and foundation of the opinion was that Allen had been intrusted by the corporation with the stock books of the company, and held out as the source of information upon the subject of the regularity of its certificates; and the force of their reasoning which pervades the whole opinion cannot be broken by the language used in a casual sentence; and the conclusion arrived at is in accord with the principle enunciated by Story in the quotation above cited, viz.: that the principal is responsible for the acts of his agent when acting within the scope of the general authority conferred upon him. That does not mean that he does the precise thing which the principal has authorized him to do, but when, so far as the world knows, or can know with reasonable diligence, he has so done, the principal is required to respond. Any other rule would place every person at the mercy of a principal, where dealings had been had through an agent; and in respect to corporations it would be absolutely impossible that business could be conducted, because the only way to ascertain whether any of its officers have authority to act would be to call a meeting of the board of directors, and get a resolution passed certifying to their powers in respect to each individual transaction. Corporations have become so general that the courts have been compelled to recognize the

fact that the officers are to be presumed to have the authority to perform the duties which such officers ordinarily perform in corporations of like character."

The court also held that the plaintiff was entitled to be subrogated to any claim the American Exchange Bank had, based upon the representations made to it at the office of the defendant before the original loan was made. The case of *Gaus v. Thieme*, 93 N. Y. 225, was especially relied upon to sustain this view.

The case of *Hollman v. Forty-second St. & Grand St. Ferry R. Co.*, 26 N. Y. S. 558, was decided at the same time as the case last referred to, and a judgment for the plaintiff was affirmed on the first ground considered in the *Mutual Life Ins. Co.*'s case. The precise facts in regard to the certificate in the *Hollman* case do not appear, but they are assumed to be the same as in the *Mutual Life Ins. Co.*'s case.

In these cases there appears to have been no reference to the decision of the court of appeals in *Manhattan Life Ins. Co.* against the same defendant, which is the next reported case in this volume. By reference to the case it will appear that the same Allen while president of the defendant company in 1888 filled out a certificate, which had been signed in blank by a former president, and dated it in 1881. He forged the name of the then secretary and affixed his own name as transfer agent, which he was at the time the certificate was dated. The certificate was made out to Allen and he used it as collateral security for a loan, which he obtained directly of the plaintiff. The certificate, therefore, purported to be properly certified for a certificate issued in 1881 but had none of the indicia of a genuine certificate issued in 1888, unless it was the blank form on which it was made out. It was held that the act of Allen was not within the apparent scope of any authority which the corporation had conferred upon him and that it was not liable to the plaintiff in respect of the certificate. There was no negligence, unless it was the act of the former president in signing the certificate in blank, and this was a matter not considered by the court.

The *Manhattan* case and the *Mutual* case differ in this; in the former Allen was president and had authority to sign but not to issue certificates; in the latter he was transfer agent and had authority both to sign and issue certificates. But in neither case did Allen have any authority, real or apparent, to issue such certificates as were involved in those cases. In the *Manhattan* case the court of appeals says: "The rule which imposes a liability upon the principal for the unauthorized acts of his agent is founded upon public policy, and is well defined. *It is limited to cases where there was an apparent authority to do the act in question, and it appeared to have been done in the course of his employment as agent, and was within the scope of his general powers.* None of these grounds of liability have been shown here. The agency did not exist in 1888, which was necessary in order to deprive the principal of the right to disclaim responsibility for the unauthorized act, *with respect to the creation of certificates bearing date in 1881, he was as destitute of authority as if he had been a stranger to the corporation. He not only could not issue them, but he could take no part in their issue, or do any act required by law or by the by-laws essential to give them validity.* When he issued such a certificate in his own name, he was not apparently acting within the scope of any general authority conferred upon him by the corporation."

Why are not these principles equally applicable to the certificate involved in the Mutual case? Allen had no authority, real or apparent, in 1886, to issue a certificate dated in 1888 and bearing the signatures of former officers. The logic of the Manhattan case seems to be, that to make the corporation liable for the act of its agent in issuing a fraudulent certificate, the act must be one within the apparent scope of the agent's authority *at the time it is done, that is the certificate must be such in form and effect as he had authority to issue at the time it was issued.*

5. Liability with respect to forged certificates issued by an officer having authority to sign but not to issue certificates.—This question arose in *Hill v. C. F. Jewett Pub. Co.*, 154 Mass. 172; 28 N. E. Rep. 142. Jewett was president of the company and had access to its book of blank stock certificates and to its seal. A by-law required the president to sign all stock certificates. Another provided "that each stockholder shall be entitled to a certificate of his stock under the seal of the corporation, and signed by its president and treasurer." The president issued the certificates in question by filling out blanks in due form, affixing the seal of the corporation, signing his own name as president and forging the name of the treasurer. The certificates were apparently in due form. The fraud was discovered and the corporation refused to recognize the certificates and the plaintiffs brought suit. A recovery was claimed on the ground that the corporation was liable for the act of its president in issuing the certificates, and on the ground of negligence in continuing the president in office after he had been known to be guilty of misconduct in regard to stock.

As to the former ground, the court says that the president had no actual or ostensible authority to issue certificates and, as they were in fact invalid, the corporation was not liable for his act. It did not appear that anyone was especially authorized to *issue* certificates, nor did it appear what the practice had been in that respect. Apparently the by-laws provided that certificates should be signed by the president and treasurer, and provided that stockholders should receive certificates, without providing who should issue them. In such case it would seem that it was intended that the certificates should be issued by one of the certifying officers, since it could not be supposed that that important function should be performed by some one not designated, who had nothing to do with making certificates. And in the absence of any designation of either the president or treasurer to issue certificates, it would seem most reasonable that this might be done by either, as convenience required. The question is an important one and it may be doubted whether the protection of the public does not require that a certifying officer should be deemed to have, by virtue of his position alone, power to make delivery or issuance of certificates. The case might be different as to one who is only authorized to countersign certificates.

The negligence relied upon consisted in continuing the president in office after he had pledged his stock to one creditor in violation of a previous agreement to pledge it to another, and in allowing him access to the book of stock certificates and the seal. In order to reach the conclusion that the corporation was liable on this ground, it was held that "it must appear that the frauds and forgeries of Jewett were such natural and probable results of his continuance in office of president of the corporation that the defendant ought to have antici-

pated and guarded against them." It was held that what Jewett had done did not give reason to suppose that he would issue forged certificates, and that the corporation was not liable for his fraud, "as for an act made possible by its negligence."

See, also, *Manhattan Life Ins. Co. v. Forty-second St. & Grand St. Ferry R. Co.*, referred to in the last section and reported as the next case in this volume.

6. Liability with respect to certificates bearing the genuine signatures of the proper officers and the genuine seal of the corporation, but false and fraudulent, in fact, and put in circulation by one having no authority to certify and issue certificates.—There is no case relating to stock certificates which falls precisely within this class, unless it is the two cases considered in the following section, where the certificates were issued to a fictitious person, and which we have placed in a class by themselves. The case of *Western Maryland R. Co. v. Franklin Bank*, 60 Md. 36, is closely analogous and is usually classed with cases relating to stock certificates. The railroad company was in default as to certain coupons, which it could not pay, and issued a series of refunded certificates therefor. The certificate was made out for the amount of the coupons surrendered. The coupons were deposited with a trust company, which receipted therefor on the back of the certificate. The certificates were signed by the president and secretary of the railroad company and sealed with the corporate seal. The person to whom the certificate was issued signed a receipt, which operated as an assignment of the certificate and coupons and of all claims thereunder to the bearer of the certificate. They were designed to circulate freely, were treated by the company as payable to bearer, and were bought and sold and passed from hand to hand in the market of Baltimore. One John S. Harden, Jr., was a son of the treasurer of the company, and a clerk in his office, and attended especially to the clerical work of issuing these certificates. He was in the habit of receiving the coupons, depositing them with the trust company, and procuring their receipt, procuring the execution of the certificate, taking the receipt of the holder and delivering the certificate. The president was in the habit of signing certificates in blank, and, on one occasion, when both were to be absent, certificates signed in blank by both the president and secretary and sealed with the corporate seal, were left with Harden, for use as occasion might require. Harden fraudulently filled out three of these blanks, one in the name of a third person and two in the name of himself, forged the receipt of the trust company for the coupons described, and executed the usual receipts therefor on the books of the company. The plaintiffs acquired these receipts of Harden for a valuable consideration and without notice of any facts except what the certificates themselves afforded. The court found that Harden was authorized by the company to issue genuine certificates, that, therefore, in issuing the certificates in question he was acting within the apparent scope of his authority and that the company was responsible for his fraud. The principle was invoked that, as both the plaintiffs and the company had been deceived by Harden, the company, who had placed him in a position to commit the fraud, should suffer the loss. The reasoning and conclusions in *Tome v. Parkersburg Branch R. Co.*, 89 Md. 36, were approved. It was also

held that the fact of two of the certificates being in the name of Harden did not put the plaintiffs upon inquiry.

Though Harden was not a certifying officer, the findings of fact in the case place him in substantially the same position as one who is authorized to certify, complete and issue certificates. He was authorized to perform the clerical work in connection with the issue of a certificate, and, according to the assumption or finding of the court, to *procure* its due execution and *deliver* it in its completed form to the person entitled. In these transactions the public might not come in contact with any agent of the company but Harden, and they were authorized in presuming that the certificates, which he was authorized to procure and deliver, were in all respects genuine and valid. In this view the case falls practically in the same category as those in classes one and two, above considered.

No account is taken in the decision of the negligence of the president and treasurer in signing and sealing certificates in blank and leaving them with Harden.

It may be doubted whether the finding that Harden was authorized to *procure* the execution of certificates and *deliver* them to the persons entitled was justified by the facts. Apparently Harden was a mere clerk in the treasurer's office, whose duty it was to perform such services in and about the work of the office as might be required of him. He was in the habit of receiving the coupons, of procuring the receipt of the trust company, of filling out the certificate, of taking it to the proper officers for their signatures, and of receiving it in its completed form from the treasurer and handing it to the person entitled. These facts do not seem to warrant the conclusion that Harden was authorized to procure the execution of, and to issue the certificates, and, in effect, to warrant their genuineness. According to the logic of the decision the result should have been the same if the certificates had been altogether forgeries, including the signatures of both the president and treasurer and the seal of the corporation. For the decision virtually holds that the act of Harden in delivering a certificate was, in effect, a warranty of its genuineness binding on the corporation. This seems an unwarranted conclusion, and one which would unjustly extend the liability of corporations.

There is another ground upon which the decision may be justified. The corporation had appointed the president and treasurer to make and issue certificates. It was responsible for their negligence in the performance of their duty. The signing and sealing of certificates in blank and leaving them with Harden was such negligence. This negligence afforded the opportunity for the fraud, and according to the authorities was the proximate cause thereof. *New York, etc., R. Co. v. Schuyler*, 34 N. Y. 30; *Citizens' National Bank v. Cincinnati, etc., R. Co.*, 29 Weekly L. B. 15, and see *post*, § 11.

7. Liability with respect to certificates regular in form and with genuine signatures and seals, but fraudulently issued in the name of a fictitious person.—In the case of *Jarvis v. Manhattan Beach Co.*, 53 Hun, 362, the following facts appeared: One Fullerton was a clerk in the office of defendant where transfers of stock were made. He fraudulently procured the execution by the president and assistant treasurer of the de-

fendant of a certificate of stock for 100 shares to B. Bignell, a fictitious person, and receipted for it in that name. The *defendant*, so the case states, procured the certificate to be countersigned and registered by the Central Trust Company. Fullerton endorsed the certificate in the name of B. Bignell and gave it to Fox & Co., stock brokers, to be sold. Before doing so, the latter made inquiries at the general office of the company, and were there informed that the certificate was duly endorsed, and that the person in charge was ready to transfer the stock. There was some controversy whether the person who made these representations was authorized to do so, but the jury found that he was, and the evidence was held sufficient to justify the finding. They then sold the certificate on the stock exchange and paid the proceeds to Fullerton. By a rule of the stock exchange the seller guaranteed the correctness of the certificate and of the endorsement for transfer. Afterwards Fullerton absconded and the fraud was discovered. Fox & Co. made good their guaranty, received back the certificate, and assigned it to the plaintiffs, who brought suit against the corporation for refusing to transfer the stock. The corporation was held liable on the ground that it was estopped by its certificate and by the representations made in answer to the inquiries of Fox & Co. The ground upon which this decision manifestly rests is, that the defendant was estopped by its representation that the certificate was properly assigned and endorsed, and that it was ready to make a transfer of the stock represented by it, thus emphatically affirming the entire validity of both the certificate and endorsement, and the further fact that Fox & Co. relied and acted upon these representations. No liability could have been imposed upon the corporation by the act of Fullerton in issuing the certificate. Anyone taking a certificate purporting to be assigned or endorsed in blank by the person to whom it is issued, does so subject to the validity of the endorsement. Cook, Stock & Stockh, §§ 436, 437. The certificate in question having been issued to a fictitious person, any valid endorsement was impossible, and the corporation could not be made liable upon it, except by some subsequent recognition of its validity. Cook, Stock & Stockh, §§ 253, 436, 437.

Manhattan Beach Co. v. Horned, 27 Fed. Rep. 484, is another case arising out of a similar fraud by the same Fullerton. The certificate was issued in the same way in the name of a fictitious person, and assigned in blank by Fullerton. The plaintiff bought it in the stock exchange, took it to the company and procured a new certificate. After the fraud was discovered, the company filed a bill to have the certificate canceled. Wallace, J., held that, while the company was not liable for the fraud and forgery of Fullerton and the plaintiffs were without remedy as holders of the original certificate, yet, by issuing the new certificate, it had lulled the plaintiffs into security, whereby they had lost the opportunity of proceeding against Fullerton, who had absconded, and that it was thereby estopped to dispute their title to the shares.

8. Liability with respect to certificates surrendered for cancellation, and fraudulently reissued.—The only case illustrative of this question is that of Knox v. Eden Musee American Co., 25 N. Y. S. 164, decided by Wm. G. Choate, as referee. One Jurgens was general manager of the defendant and one Reynolds was in its employ. Reynolds obtained a loan from

the plaintiff on a note made by himself and endorsed by Jurgens and pledged four certificates of stock in the defendant company, for five shares each, as collateral security. These certificates were regularly endorsed in blank, except one which had the name of Seligsburg & Co. as attorneys, to make transfer. The loan being unpaid, plaintiff applied for a transfer of the stock represented by the certificates, which was refused, and suit brought. The certificates formerly belonged to Seligsburg & Co., of which one Hillman, president of the defendant company, was a member. The shares were sold to one Siebrecht, and the certificates were placed by Mr. Hillman in the company's safe, which was in charge of Jurgens, with instructions to the latter to make the transfer to Siebrecht, when the latter paid the agreed price. Subsequently Jurgens presented to Hillman for his signature a new certificate for the twenty shares, made out to Siebrecht, complete except as to Hillman's signature, and the latter signed it. The transfer was completed, the money paid by Siebrecht and received by Hillman. Subsequently Jurgens pledged the old certificates as above stated. The by-laws of the company required certificates to be signed by the president or vice-president and the treasurer, and also required the secretary to cancel certificates exchanged or returned, and provided that no new certificate should be issued until the old one had been canceled. Jurgens had charge of the books and office of the company and himself attended to the cancellation of certificates and the issue of new ones, filling out the blanks and procuring the signatures of the proper officers thereto. Hillman had never before signed new certificates without seeing that the old ones were canceled. No examination of the stock, transfer or certificate books was made or provided for by the directors or officers. Only \$330,000 out of \$400,000 of the authorized stock of the company had been issued. The suit related only to the fifteen shares endorsed in blank.

The referee held that the corporation was liable to the plaintiff on the ground of negligence, and that there was nothing in the facts that amounted to contributory negligence on the part of the plaintiff or impeached his good faith in the transaction. The referee says: "The liability in this case, if any, rests upon the ground of negligence on the part of the corporation, whereby the plaintiff has suffered damage; and in cases of damage by negligence it must generally be shown that the defendant has been guilty of negligence which caused the injury, and that the plaintiff has not been guilty of contributory negligence. It is argued that the by-law that has been referred to, prescribing a mode of surrender and cancellation, is one for the protection of the corporation. It may be adopted especially for the benefit of the corporation and its stockholders, but I think there can be no doubt, also, that a corporation which is authorized to issue its stocks, which become, for all practical purposes, negotiable securities, and which it invites the public to treat as such by means of the representations on the face of the certificates, is bound also to adopt reasonable rules to protect the public against the use of surrendered certificates, and to observe a reasonable degree of care and diligence in the enforcement of such rules. The by-laws adopted by the defendant are similar to those which exist in most well ordered corporations, and, if observed, are well adapted to secure the public against this danger. The single precaution ordinarily taken by the president of this company to see for himself the canceled certificates

before signing the new certificates would in most cases afford a practical safeguard against this danger. But, in this case, neither the by-law nor the usual practice of the president in that respect was followed, and I have no doubt that this was such a want of diligence and care as constituted negligence on the part of the corporation.

"The next question is whether this negligence was the cause of the plaintiff's loss. The rule is that negligence which is relied on must be the direct, and not the remote, cause; and it is argued that because Jurgens committed the crime of larceny in taking these certificates from the proper custody of the corporation and using them for his own purposes, that crime, and not the negligence of the corporation in making it possible for him to commit that crime, was the cause of the plaintiff's loss. The argument is unsound, because the improper use which was made of the certificates was what might reasonably be expected to result from leaving them uncanceled in the safe of the company, especially under the circumstances of total want of supervision on the part of the officers of the company over the mode in which their manager, Jurgens, transacted the business which he was permitted to do. It is true that ordinarily a party through whose trust and confidence in another that other has been placed in a position in which it was possible for him to defraud a third party will not be held to have been negligent because he did not anticipate the commission of a crime by the person so trusted, which crime was the immediate cause of the loss. Thus a merchant may leave his check book in the keeping of a clerk or employe of whose good character he has a reasonable assurance, and will not be held liable for negligence in so doing if another party suffers loss through the abuse of his confidence in his clerk in case the latter forges his signature to a check, and passes the same off as genuine. But in such a case it is not by reason of the fact that a crime has been committed that the party is absolved from liability, but that the crime committed was not a circumstance which the party had any reason to anticipate from the confidence that he reposed in his employe. If the same person, having in his hands money or negotiable securities belonging to a third party, to whom he owed the duty of safe custody or reasonable care in their safe keeping, should leave the same on his office table, where any employe or any stranger might easily take them without detection, he would not be excused from liability for the negligence because such taking would be larceny. So, if the same person, knowing that his clerk or employe had before committed the like offense, continued to trust him, or if he trusted a stranger of whose character he knew nothing, he might be held for negligence in the continued employment of the clerk or in the employment of the stranger, although the immediate cause of the loss to the other party was the same crime of forgery. The question, then, is whether a corporation owing to the public and to such of them as may deal in its certificates of stock this duty of protection should reasonably be held to anticipate that uncanceled certificates surrendered might through accident or fraud on the part of its employes get into circulation and be the means of causing such injury as that which the plaintiff has suffered. In my opinion, it should be held to anticipate such misuse of uncanceled certificates as possible or probable, and for such negligence would be liable to an innocent purchaser of them. As before observed in this case, the probability

of danger which would always exist was greatly aggravated by the want of supervision over the action of Jurgens, and the failure on the part of this corporation to perform those duties which they were elected and required by the by-laws and the nature of their offices to perform, and their negligence was the proximate cause of the injury."

Since the foregoing was written the case has been affirmed by the supreme court at general term and the opinion of the referee approved upon all points. The supreme court go further and hold that the corporation was liable regardless of the question of negligence. The court says: That the stock was properly issued, and the transfer indorsed thereon, duly signed in blank by the shareholder, is unquestioned, and thus, according to the established usage in the commercial world, they were acceptable to lenders or purchasers without inquiry or other formality than that of delivery, because of the recognized assurance that the stock which the certificates represented could not be transferred, except upon the delivery and cancellation of the certificate. It is true that the president of the company, who had become the holder and owner of the shares, surrendered them to the company, in order that new shares might be issued in their place to one who had purchased the stock of him, and of right the stock should have been canceled. But it was not, and later, for value, it passed into the possession of one whom, for the purpose of the present inquiry, we shall speak of as a "*bona fide* holder." While they had been delivered to the officers of the corporation for cancellation, nothing had been written or stamped upon the certificates which evinced that fact, and they came first to the attention, and next to the possession, of the plaintiff without anything upon them which in the least tended to disclose that other certificates had been issued in their place. It is difficult to see any reason why the purchaser of a certificate of stock, under such circumstances, should not be held to be in the same legal position as if he were the purchaser of a promissory note payable to bearer before maturity. Both are transferable by delivery, and the certificate bears upon its face the promise of the corporation that a new issue of stock in its stead would not thereafter be permitted without a surrender of the certificate. The object of the assurance was to induce the public to purchase them the more readily because of their easy convertibility; and when we consider the volume of daily transactions in stocks, and have in mind that stocks of railroad corporations, in this country alone, aggregate a little over 4,600,000,000, with shares in banking, business, and other corporations, almost without number, it would seem to be of the highest importance that the public should be reliably assured that certificates of stock purchased by them in good faith, with a transfer indorsed in blank, entitle them to protection not only against a claim by a prior owner that he has not parted with it, (McNeil v. Bank, 46 N. Y. 325,) but also from a claim by a corporation that the stock is invalid, because surrendered up for cancellation, and new stock issued in its place. There seems to be no good reason why, to such an extent at least, such certificates should not be deemed to have so much of the attribute of negotiable securities as to make them unassailable in the hands of purchasers in good faith and for value. * * *

The holder of a certificate of stock who indorses it in blank, which is subsequently wrongfully converted to the use of another, is estopped from asserting

his title as against a *bona fide* purchaser. For the same reason this defendant would seem to be estopped from challenging the validity of this certificate. Under the seal of the corporation, supported by the genuine signatures of two of its officers, the present holder was informed, by statements appearing upon the face of the certificate, that the shareholder named therein was entitled to a certain number of shares of stock, which could be transferred upon the books of the corporation in person, or by attorney, whenever the certificates should be surrendered, but not otherwise. In the language of Davis, J., in *Bank v. Larier*, 11 Wall. 878; "This is a notification to all persons interested to know that whoever in good faith buys the stock, and produces to the corporation the certificates, regularly assigned, with power to transfer, is entitled to have the stock transferred to him; and the notification goes further, for it assures the holder that the corporation will not transfer the stock to any one not in possession of the certificates." It is difficult to see how it is possible for the corporation to make a statement calculated to more thoroughly persuade a purchaser that the stock was still outstanding and valid; and, the plaintiff having acted upon the faith of such assurance, the corporation cannot be permitted to say that it was not true;"

The case of *Board of Education v. Sinton*, 41 Ohio St. 504, presents some analogies to the foregoing case. The board had issued the whole of a certain series of bonds. Before their maturity it took up and paid certain of these bonds, and directed its treasurer to cancel them. Instead of doing so, he pledged them as collateral security to a loan obtained from the plaintiff. The court held that the bonds were extinguished by payment and that there was no power to reissue them, that the board had not been guilty of any negligence in leaving the bonds with the treasurer with directions to cancel them, and, consequently, that the board was not liable. It was also held that as the treasurer was using the bonds for his own benefit, and as the bonds disclosed that he was a member of the board and it was manifest that he might have possession of the bonds in some other right than his own, the plaintiff was bound to inquire into the title of the treasurer, and that his failure to do so was such negligence as to defeat his action.

9. Liability with respect to certificates issued by authority of the corporation in good faith, but void or irregular by reason of some mistake of law or fact.--There is no doubt about the proposition that if a corporation authorizes certificates of stock to be issued in due form, which come into the hands of a *bona fide* holder for value, it will be estopped, as to such holder, from denying their validity, and must either recognize the certificates as valid, if that is possible, or respond in damages. *Cook on Stock & Stockh.*, § 298; 2 *Beach Corp.*, § 486, et seq.; *Tomkinson v. Balke's Consolidated Co.*, 2 Q. B. 614 (1891); *Manhattan Beach Co. v. Harned*, 27 Fed. Rep. 484. This proposition is affirmed, expressly or impliedly, in all the cases that have been thus far referred to, because the decisions proceed upon the assumption that if the fraudulent certificates in question, in each case could be made out to have been issued by authority of the corporation, its liability would thereby be fixed.

Accordingly, if a corporation has made an over-issue of stock, it will be liable to those who have taken it, relying upon the certificates. *People's Bank*

v. Kuntz, 99 Penn. St. 344; New York, etc., R. Co. v. Schuyler, 34 N. Y. 80; Bruff v. Mali, 36 N. Y. 200; Titus v. Turnpike Road, 61 N. Y. 237; Cook on Stock and Stockh., § 293; 2 Beach, Priv. Corp., § 493.

So the corporation will be liable in damages where it issues new certificates upon forged or unauthorized transfers, or upon false representations that the old certificate is lost or stolen, when, in fact, it is outstanding in the hands of a *bona fide* holder. Pratt v. Taunton Copper Co., 123 Mass. 110; Machinists' National Bank v. Field, 126 Mass. 345; Boston & Albany R. Co. v. Richardson, 135 Mass. 473; Hall v. Rose Hill & E. R. Co., 70 Ill. 673; Mandlebaum v. North Am. Min. Co., 4 Mich. 465; Wright's Appeal, 99 Penn. St. 425; Bank v. Lanier, 11 Wall. 369; Dewing v. Perdecaries, 96 U. S. 193; Telegraph Co. v. Davanport, 97 U. S. 369; Hart v. Frontina, etc., Mining Co., 5 Exch. 111; Hunter v. Westminster Internal Imp. Comrs., 7 Exch. 780; Simm v. Anglo-Am. Tel. Co., L. R., 5 Q. B. D. 188; In re Bahia & San Francisco R. Co., L. R., 3 Q. B. 584.

10. Grounds of liability—in general.—In reference to fraudulent certificates issued and put in circulation by the officers or agents of corporations, three possible grounds of liability are disclosed by the decisions: (1) negligence, (2) the rule of *respondeat superior*, and (3) estoppel, based upon some subsequent act of the corporation which amounts to a representation of genuineness. Most of the cases necessarily rest on one or both of the first two grounds, and some further consideration thereof may be of value.

11. Grounds of liability—negligence.—In some of the cases it appeared that fraudulent certificates, like the ones in question, had been issued in large numbers and through a considerable period of time, by the same agent. New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30; Allen v. South Boston R. Co., 150 Mass. 200; 22 N. E. Rep. 917; Tome v. Parkersburg Branch R. Co., 39 Md. 36; Citizens' National Bank v. Cincinnati, etc., R. Co., 29 Weekly L. B. 15. The failure of the board of directors in such cases to make proper examinations of the books and to exercise a proper supervision over the corporate affairs, whereby the frauds might have been detected and their continuance prevented, has been held to be such negligence as would render the corporation liable. See especially New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30, 57-61; The court says: "It is transparent throughout the case, that the board of directors, by passive submission or active surrender, handed over to Schuyler the substance of all their authority relating to their business in New York, and then for nearly seven years laid down to sleep in supine indifference at his feet. * * * I cannot file my mind to the belief that equity attaches no consequences to such negligence upon the idea that it is not sufficiently proximate as a cause of the injury. The company placed in Schuyler's hands the very instrumentalities by which the injury was wrought. They imposed restrictions upon their use, but they omitted the safeguards that ordinary prudence would dictate, to discover or prevent their abuse. A wrong which ordinary care will prevent, is in a legal sense, caused by the omission of that care when it is a duty to exercise it. At any stage, a discovery of Schuyler's past frauds would have arrested his career of crime. A discovery would have followed an examination of the books of the office, which were the only records of the vast transactions of the company at New York. An examination was a duty, be-

cause it was the obvious dictate of good sense as the easiest and safest check upon the agent's conduct. The long continued and reckless omission was therefore a culpable negligence, without the concurrence of which Schuyler could not have committed the frauds by which the defendants have suffered; for it was this omission of duty that left him with power to wield the weapons with which the company had armed him, and therefore it may be said to have lead directly to the injurious acts."

Liability of the corporation is put distinctly and solely upon this ground in *Citizens' National Bank v. Cincinnati, etc. R. Co.*, 29 Weekly L. B. 15. The conclusion of the court is thus stated:

"When a corporation authorizes an agent to act for it upon the happening of certain events, and the agent fraudulently assumes to act for it, for any length of time, when such fraudulent conduct would have been prevented or discovered by the exercise by the corporation of a reasonable supervision of the conduct of the agent, the negligence of the corporation in contemplation of law is the cause of the fraud of the agent, and is therefore the proximate cause of the injury. That which the corporation ought to have known it will be held to have known, and that fraud which its negligence permitted its agent to commit will be held to be its fraud. The act of the agent becomes the act of the corporation." p. 36. The court refers to the following cases in support of their views: *Cutting v. Mohler*, 78 N. Y. 454, 460; *Ouderkirk v. Railroad Co.* 119 N. Y. 263, 273; 2 Am. R. R. & Corp. Rep. 357; *Preston v. Prather*, 137 U. S. 604, 614; 3 Am. R. R. & Corp. Rep. 613; *Martin v. Webb*, 110 U. S. 15; *Leather Manufacturers' Bank v. Morgan*, 117 U. S. 96; *Briggs v. Spaulding*, 141 U. S. 132; 4 Am. R. R. & Corp. Rep. 712; *Allen v. South Boston R. Co.*, 150 Mass. 200; *Railroad Co. v. Schuyler*, 34 N. Y. 30.

In *Citizens' National Bank v. Cincinnati, etc. R. Co.*, 29 Weekly L. B. 15, the first fraudulent certificate was issued on November 9, 1881, and the earliest certificate in controversy was dated February 18, 1882, so that the court, in effect, held that it was negligence not to have discovered the frauds in a period of two months and nine days. Stress is laid upon the fact, not only that no examination was made during that period, but also that no examination whatever was provided for or had ever been practiced, so that the fraudulent agent was not restrained by the knowledge or probability that one would be made.

However sound these views may be, it is manifest that they could only apply in case of certificates which were issued after the board of directors ought, by the exercise of reasonable diligence and attention to their duties, to have ascertained the frauds that were being perpetrated. But, according to the authorities reviewed, the corporation would be equally liable for the first false certificate as for the last one. Moreover this ground of liability applies only in case of frauds perpetrated by an officer authorized to issue certificates, and in such cases there is another and more general and more satisfactory ground of liability. Though negligence of the board of directors in failing to exercise a proper supervision over the affairs of the corporation and the doings of its officers and agents, might be relied upon as an independent ground of liability in such cases as that of the Schuyler frauds, it is not an essential element or common ground of liability in the cases under consideration, since the cor-

poration is liable where the fraud is confined to a single transaction and no negligence whatever can be imputed to it in the matter of supervision.

The practice of signing certificates in blank by one officer and leaving them in the custody or control of the officer or agent who is entrusted with the duty of completing and issuing certificates, has been referred to as negligent and a possible ground of liability. The practice was pronounced to be gross negligence in *Allen v. South Boston R. Co.*, 150 Mass., 200. It was pronounced negligence on the part of the officer in *Citizens' National Bank v. Cincinnati, etc., R. Co.*, 29 Weekly L.B.15, but the liability of the corporation therefor was not discussed by counsel or considered by the court. This form of negligence was present in several of the other cases, but was not referred to. The first question which arises in regard to this species of negligence, is whether it can be regarded as the proximate cause of the subsequent fraudulent use of the certificate. A somewhat similar question was passed upon in *Bank of Ireland v. Evan's Charities*, 5 H. L. Cas. 389. The plaintiffs were trustees of certain incorporated charities and, as such, held stock in the public funds, registered in the Bank of Ireland. The trustees had a common seal which they left in the control of the secretary. The latter forged a power of attorney to transfer the stock, affixed the corporate seal and, by means of artifice, procured witnesses to attest the execution of the instrument. With this he procured a transfer of the stock. When the fraud was discovered, the trustees caused a due power of attorney to be executed for a transfer of the stock and demanded such transfer, which was refused. Thereupon they brought suit. The trial court instructed the jury that, if the power of attorney on which the transfer had been made was a forgery, then the defendants were liable, unless they believed that the plaintiffs were negligent in leaving their seal in the custody of the secretary, and that such negligence was the cause of the loss, and in that case, they were to find for the defendants. On appeal it was held in the House of Lords that this direction was erroneous and that there was in fact no evidence of negligence to go to the jury. In an opinion, which was fully concurred in, it is said: "Now, we all concur in opinion that the evidence given, which was only of a supposed negligent custody of their corporation seal by the trustees, in leaving it in the hands of Mr. Grace, whereby he was enabled to commit the forgeries, is not sufficient evidence of that species of negligence which alone would warrant a jury in finding that the plaintiffs were disentitled to insist on the transfer being void. We concur with Mr. Justice Jackson, and Justices Ball, Crampton and Torrens, and the Chief Justice Defroy, in thinking that the negligence which would deprive the plaintiff of his right to insist that the transfer is invalid, must be negligence in or immediately connected with the transfer itself." This case was followed in *Mayor, etc., v. Bank of England*, 21 Q. B. D. 160, which presented a similar question. And see *Hill v. Jewett Pub. Co.*, 154 Mass. 172; 28 N. E. Rep. 142.

But if it be conceded that it is negligent for one officer to sign certificates in blank and leave them to be completed and delivered by another officer or agent, and that such negligence is the proximate cause of a subsequent fraudulent use of the certificate, the question remains whether the corporation is responsible for such negligence. Upon this point there would seem to be little

room for doubt, since the officer, in signing the certificate, is acting in the line of his duty and employment. But if the corporation is liable for such officer's negligence, it would seem to be equally liable for the wrongful act of the agent who makes a fraudulent use of the certificate after it is signed. When certificates are to be signed by two or more officers, it is undoubtedly the duty of each to see, before signing a certificate, that the conditions exist which authorize him to act. There can be no other object in requiring the signatures and concurrence of two officers or agents to the completion of the certificate. Now one officer has no more authority from the corporation to sign a certificate in blank than another has to fill it up and issue it when there has been no sale or transfer of stock. As between the officer and the corporation, neither has any power to act except in case of a *bona fide* transaction in which the issue of a certificate becomes necessary. If the corporation is liable for the careless and wrongful act of the one in signing a certificate when there has been no such transaction, it is equally liable for the fraudulent and wrongful act of the other in signing, sealing and issuing the certificate. In this connection the remarks of the court in *Reynolds v. Witte*, 13 S.C. 5, 16, are pertinent. The case involved the fraudulent disposition by an agent of the bonds of a third person, which had been entrusted to him by the principal. On the question whether any distinction could be made between a loss by the negligence of the agent and a loss by his fraud the court says: "It is difficult to understand upon what ground the principal should be held liable for the negligence of his agent and not for his fraud, where the act is done or omitted to be done to the very property as to which the agency exists, and in the course of the agency. Fraud by which the property is lost is generally considered one of the forms of gross negligence. What is the proper understanding of the phrase 'within the scope of the agency'? Does 'the scope' include negligence and exclude fraud? It cannot properly be restricted to what the parties intended in the creation of the agency, for that would also exclude negligence, as no agent is appointed for the purpose of being negligent, any more than for the purpose of acting fraudulently. The question cannot be determined by the authority intended to be conferred by the principal. We must distinguish between the authority to commit a fraudulent act, and the authority to transact the business in the course of which the fraudulent act is committed. Tested by reference to the intention of the principal, neither negligence nor fraud is within 'the scope of the agency'; but tested by the connection of the act with the property and business of the agency, fraud in taking the property is as much 'within the scope of the agency' as negligence in allowing others to take it. The proper inquiry is, whether the act was done in the course of the agency and by virtue of the authority as agent. If it was, then the principal is responsible, whether the act is merely negligent or fraudulent." Hence the same principle which would make the corporation liable for the careless act of one officer in signing a certificate in blank, would make it liable for the fraudulent act of another in completing and issuing the certificate without right, and the question of the negligence of the former thus becomes immaterial.

Again the corporation is liable, according to the decisions, even though there has been no such negligence as that now supposed. It is immaterial whether the fraud has been committed by use of a certificate signed in blank by one

officer or by procuring his signature through fraud or artifice or by forging such signature. In each case the corporation is liable. The question of negligence, in signing certificates in blank, therefore, becomes immaterial, since there must be some common ground, not involving such negligence, upon which liability can be predicated. This common ground is the rule of *respondant superior*, or the law of principal and agent as applicable to the circumstances of the case.

It is not conceivable that a corporation could be made liable upon a certificate signed in blank by one officer and left with another certifying officer, unless the latter also signed the certificate. In order that such a certificate should be issued without such other signing it, it would have to be done by some employe or stranger, having no authority, real or apparent, to issue certificates. Such person would have to obtain the certificate by theft or fraud, forge the signature of the second officer, and forge or surreptitiously affix the corporate seal. The negligent signing of a certificate in blank by one of two or more certifying officers, could not be considered as the proximate cause of such fraud and crime. But if the certificate is signed and issued by the second officer, then, as already stated, the liability of the corporation may be placed upon other grounds.

In case of certificates, signed in blank by both certifying officers, and fraudulently filled out and issued, the corporation would doubtless be liable, no matter how or by whom the certificate was issued. The negligence would be gross and the result such as might naturally be expected to flow therefrom. See *Western Maryland R. Co. v. Franklin Bank*, 60 Md. 36; also sec. 6 of this note.

Another sort of negligence is suggested in the case of *Hill v. Jewett Pub. Co.*, 154 N. Y. 173; 28 N. E. Rep. 142, and that is in continuing in the position of a certifying officer, one who is known to have been guilty of conduct, impeaching his integrity and reliability. See *Preston v. Procter*, 137 U. S. 604; 3 Am. R. R. & Corp. Rep. 618. But this could not form a distinct ground of liability, except in case of an officer authorized to issue certificates, and, as to the fraudulent act of such an officer, the corporation would be liable independently of negligence.

12. Ground of liability—principal and agent—rule of respondent superior.—It is a well settled rule that corporations are liable for the frauds and wrongs of their agents to the same extent as natural persons. "Corporations, carrying on trade or business of any kind, are equally, and to the same extent, liable for the frauds and wrongs of their agents, perpetrated in the course of their employment, as individual principals would be under like circumstances." *Western Maryland R. Co. v. Franklin Bank*, 60 Md. 36. "As natural persons are liable for the wrongful acts and neglects of their servants and agents, done in the course and within the scope of their employment, so are corporations, upon the same grounds, in the same manner, and to the same extent." *Angell & Ames on Corps.* sec. 810; citing *Abbott v. Savings Bank*, 1 Md. Ch. 407; *Thatcher v. Bank*, 5 Sandf. 121; *Thompson v. Bell*, 10 Exch. 10; 26 Eng. L. & Eq. 536; *Bargate v. Shortridge*, 5 H. L. Cas. 291; 31 Eng. L. & Eq. 44; *National Exchange Co. v. Drew*, 32 Eng. L. & Eq. 1; *Stevens v. Boston R.*, 1 Gray, 277; *Blackstock v. New York R. Co.*, 1 Bosw. 77. "It is well settled, says Mr. Morawitz, "that the law of agency applies equally to

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corporations and to individuals." 2 Mor. Corp. § 577. See also, Philadelphia, etc., R. Co. v. Quigley, 21 How. 202, 210; Tome v. Parkersburg Branch R. Co., 39 Md. 36, 70-72; Lowry v. Bank, Taney, 310; Wharton, Con. § 131.

It is laid down by Story that the principal is "liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malseasances, or misfeasances, or omissions of duty, of his agent, in the course of his employment, although the principal did not authorize, or justify, or participate in, or, indeed, know of such misconduct, or even if he forbade the acts or disapproved of them. In all such cases, the rule applies, *respondeat superior*; and it is founded upon public policy and convenience; for in no other way could there be any safety to third persons in their dealings, either directly with the principal, or indirectly with him through the instrumentality of agents. In every such case, the principal holds out his agent as competent and fit to be trusted; and thereby, in effect, warrants his fidelity and good conduct in all matters within the scope of the agency." Story, Agency, § 452. See also Mechem on Agency, §§ 734, 739, and cases cited; Tome v. Parkersburg Branch R. Co., 39 Md. 36; Baltimore & Ohio R. Co. v. Wilkins, 44 Md. 23; Western Maryland R. Co. v. Franklin Bank, 60 Md. 36. Another general principle, equally elementary, is that, as between the principal and third persons, the former is responsible according to the agent's apparent authority, and not merely according to his real authority. In Mechem on Agency it is said: "The authority of the agent, so far as third persons are concerned, is as broad not only as the words of the principal, but as broad also as his acts and conduct. In other phrase it is, so far as third persons are concerned, as broad as the principal has made it appear to be. As respects the mutual rights and dealings of the principal and agent, the *actual* authority may govern; but as respects the liability of the principal to third persons for the acts and contracts of the agent, it is the *apparent* authority which controls." § 707; Brooke v. New York, etc., R. Co., 108 Penn. St. 543; 1 Atl. Rep. 206.

When, therefore, false and fraudulent certificates of stock have been issued or put in circulation by an officer or agent of a corporation, and some third person has given value therefor in good faith, the question to be determined is whether the act of the officer or agent is within the *apparent* authority conferred upon him by the corporation. If so, the corporation must respond to the injured party for the act of its agent, irrespective of any question of negligence; if not, the corporation is not liable under the rule *respondeat superior*, and can only be made responsible through some negligence which may be regarded as the proximate cause of the act.

We believe it can only become necessary to issue certificates of stock to three classes of persons: (1) to original subscribers, (2) to purchasers of stock which the corporation has acquired by forfeiture, or otherwise, and (3) to transferees. Certificates may be issued to replace those lost or stolen, but probably this is never done without a special order of the board of directors. In the nature of things every person has notice that the officers or agents appointed to issue certificates can lawfully only do so in case of a *bona fide* transaction falling within one of these classes. Mechem, in speaking of the authority of an agent, says:

“ If the authority is known to be open for exercise only in a certain event, or upon the happening of a certain contingency, or the performance of a certain condition, the occurrence of the event or the happening of the contingency, or the performance of the condition, must be ascertained by him who would avail himself of the results ensuing from the exercise of the authority.” Mechem on Agency, § 291; citing Croycraft v. Selvage, 10 Bush. 696; Weise’s Appeal, 72 Penn. St. 351; Kirkpatrick v. Winans, 1 C. E. Green (N. J. Ch.), 407. This is doubtless a correct general rule, and might be said to apply to the agents authorized to issue stock certificates. Everyone has notice from the nature of the case that such agents have no valid authority to issue stock certificates, except in case of an actual purchase or transfer of stock. The exercise of the authority may, therefore, be said to depend “ upon the happening of a certain event, or the performance of a certain condition,” and this is known to all persons who deal with certificates of stock. Must every such person, then, ascertain at his peril the “ happening of the contingency or the performance of the condition ” upon which the lawful issue of the certificate in question depended ?

In New York the answer to this question is found in the following proposition, which has been repeatedly reaffirmed and applied: “ It is the settled doctrine of the law of agency in this state that where the principal has clothed his agent with power to do an act upon the existence of some extrinsic fact necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person dealing with such agent in entire good faith, pursuant to the apparent power, may rely upon the representation, and the principal is estopped from denying its truth to his prejudice.” Bank of Batavia v. New York, etc., R. Co., 106 N. Y. 195, 199; North River Bank v. Aymar, 3 Hill, 262; Farmers’ & Mechanics’ Bank v. Butchers’ & Drovers’ Bank, 16 N. Y. 125; Griswold v. Haven, 25 N. Y. 593; Exchange Bank v. Monteath, 26 N. Y. 505; New York, etc., R. Co. v. Schuyler, 34 N. Y. 30; Armour v. M. C. R. Co., 65 N. Y. 111.

In the Schuyler case, the facts of which have already been stated at length, the court, referring to the above cited cases of prior date, said: “ In each of these cases, the extrinsic fact which constituted the condition of the authority was peculiarly within the agent’s knowledge, and was necessarily represented to exist by the execution of the agent’s powers. It might or might not be discovered by inquiry. So in this case, in the narrow view in which we are now considering it, the condition upon which the agent could issue the certificate was, a transfer in the books and the surrender of a previous certificate, if any had before been issued. These facts are wholly extrinsic and peculiarly within the knowledge of the agent, as part of the special duties to be attended to by him, and were represented by him to exist by the certificate itself. I can see no shade of difference between the question in this case and in those cited, and which seem to me to settle the law. The rule which governs this class of cases, in my judgment, rests upon a sound principle. As was said by Selden, J., in Griswold v. Haven, ‘The mode in which the liability is enforced in all these cases, is by *estoppel in pais*. The agent or partner has in each case made a representation as to a fact essential to his power, upon the faith of which the other party has acted, and the principal or firm is precluded from controvert-

ing the fact so represented.' It goes back to the celebrated aphorism of Lord Holt, in *Hern v. Nichols* (1 Salk. 289), 'For seeing that somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver, should be a loser than a stranger,' or as more tersely expressed by Ashurst, J., in *Lickbarren v. Mason*, 2 T. R., 70, 'Whenever one of two innocent parties must suffer by the act of a third, he who has enabled such third person to occasion the loss must sustain it.' (Story on Part., § 108, and authorities cited.) In truth, the power conferred in these cases is of such a nature that the agent cannot do an act appearing to be within its scope and authority, without, as a part of the act itself, representing expressly or by necessary implication, that the condition exists upon which he has the right to act. Of necessity the principal knows this fact when he confers the power. He knows that the person he authorizes to act for him, on condition of an extrinsic fact, which in its nature must be peculiarly within the knowledge of that person, cannot execute the power without as *res gestæ* making the representation that the fact exists. With this knowledge he trusts him to do the act, and consequently to make the representation which, if true, is of course binding on the principal. But the doctrine claimed is that he reserves the right to repudiate the act if the representation be false. So he does as between himself and the agent, but not as to an innocent third party who is deceived by it. The latter may answer, you intrusted your agent with means effectually to deceive me by doing an act which in all respects compared with the authority you gave, and which act represented that an extrinsic fact known to your agent or yourself, but unknown to me, existed, and you have thus enabled your agent, by falsehood, to deceive me, and must bear the consequences. The very power you gave, since it could not be executed without a representation, has led me into this position, and therefore you are estopped in justice to deny his authority in this case. By this I do not mean to argue that the principal authorizes the false representation. He only in fact authorizes the act, which involves the representation, which, from his confidence in the agent, he assumes will be true; but it may be false, and the risk that it may be he takes because he gives the confidence and credit which enables its falsity to prove injurious to an innocent party. I have already shown how this principle in many cases sustains liability after all actual authority has been withdrawn, as between the principal and parties who have a right to infer that the authority continues.

"The contrary doctrine would be singularly inconvenient, if not absurd, in practice. For instance, under a general power to draw bills, which means, of course, only in the business of the principal, no party could safely take a bill drawn by the agent without pursuing the inquiry whether it was drawn in such business to extremes. If the peril is on the party to whom the bill is given, nothing short of personal application to the principal himself can relieve it, for nowhere short of that is absolute certainty. Every intermediate appearance or representation may be false or deceptive, and the rigid rule of *actual authority* will be satisfied with nothing less than absolute verity. So, then, the general power carries no safety whatever, since each bill made under it must be verified as to extrinsic facts by resort for perfect security to the principal himself.

“ Or to bring the illustration nearer to this case: It is claimed that every receiver of a stock certificate, executed by an agent, must verify, at his peril, the extrinsic facts that a transfer of the stock has been made and the former certificate surrendered. But how? If he go to the board of directors they can only refer him to the transfer agent or the books kept by him, for these are alone their sources of information. If he resort to the books they are at best but other representations of the agent which, if they in form show a transfer, may still be deceptive, and nothing but a transfer of *actual stock* will answer the condition. He must therefore trace the lineage of the stock represented by the certificate to some point behind which no ‘stain upon the pedigree’ will enable the corporation to bastardise the issue. Such a rule would be vastly detrimental to the business interests, both of the corporations and of the public.” 34 N. Y. 30, 69-71.

The New York doctrine has been applied in that state, as will be seen by reference to the cases cited, not only to stock certificates, but to negotiable paper issued by an agent in the name of his principal, and fraudulently used by the former for his private benefit, to checks fraudulently certified in the absence of funds, and to warehouse receipts and bills of lading fraudulently issued by agents where no property was received. The doctrine is again affirmed and applied to stock certificates in the principal case. The doctrine is thus well established in New York and is applied to all cases which come within its purview. But it cannot be said to prevail generally in other states (see next section) nor to have become one of the settled doctrines of the law of principal and agent. But however this may be, it seems to us that the same result may be reached by considering the peculiar nature of stock certificates, and that it is not necessary to assume or establish the correctness of the New York rule in its general form and as applied to all cases within its scope.

Certificates of stock are not issued for the mere purpose of evidencing title in the person to whom they are issued. One of the leading objects of incorporation is to put the shares of individual owners in the joint enterprise in shape to be readily transferred. Certificates of stock are addressed to the public, are intended to pass from hand to hand, and be dealt in upon stock exchanges and in the markets of the world. Corporations are in the habit of affording every facility for this traffic in their stocks, and thus not only recognize but encourage such dealing. In *re Bahia & San Francisco R. Co.*, L. R., 3 Q. B. 584; *New York, etc., R. Co. v. Schuyler*, 34 N. Y. 30, 82, 83; *Bank v. Lanier*, 11 Wall. 369; *Citizens' National Bank v. Cincinnati, etc., R. Co.*, 29 Weekly L. B. 15; *Willis v. Fry*, 13 Phila. 33; *Mandlebaum v. North Am. Mining Co.*, 4 Mich. 465. In the first of these cases it is said: “This power of granting certificates is to give the shareholders the opportunity of more easily dealing with their shares in the market, and to afford facilities to them of selling their shares by at once showing a marketable title, and the effect of this facility is to make the shares of greater value. The power of giving certificates is, therefore, for the benefit of the company in general; and it is a declaration by the company to all the world that the person in whose name the certificate is made out, and to whom it is given, is a shareholder in the company, and it is given by the company with the intention that it should be so used by the person to whom it is given, and acted upon in the sale and trans-

fer of shares." So in *Bank v. Lanier*, 11 Wall. 369, 877, the court says: "The power to transfer their stock is one of the most valuable franchises conferred by congress on banking associations. Without this power, it can readily be seen the value of the stock would be greatly lessened, and, obviously, whatever contributes to make the shares of the stock a safe mode of investment, and easily convertible, tends to enhance their value. It is no less the interest of the shareholder, than the public, that the certificate representing his stock should be in a form to secure public confidence, for without this he could not negotiate it to advantage. It is in obedience to this requirement, that stock certificates of all kinds have been constructed in a way to invite the confidence of business men, so that they have become the basis of commercial transactions in all the large cities of the country, and are sold in open market the same as other securities. Although neither in form or character negotiable paper, they approximate to it as nearly as practicable. If we assume that the certificates in question are not different from those in general use by corporations, and the assumption is a safe one, it is easy to see why investments of this character are sought after and relied upon. No better form could be adopted to assure the purchaser that he can buy with safety. He is told, under the seal of the corporation, that the shareholder is entitled to so much stock, which can be transferred on the books of the corporation, in person or by attorney, when the certificates are surrendered, but not otherwise."

Now if such is the purpose of stock certificates and of corporations in issuing them, it is manifest that that purpose would be defeated if every person about to take a certificate was bound to ascertain the existence of those extrinsic facts, which were necessary to authorize its issue, as between the corporation and its agents. Such investigations might necessitate long journeys, or the employment of agents in distant places, and would so burden and delay transactions in stock that dealings therein would soon cease. Nor do corporations, as matter of fact, expect or invite such investigations or provide facilities for making them. In case of many corporations, the transactions in their stock are so numerous that any such investigations would be utterly impossible. The only rational conclusion, therefore, is that corporations intend that a certificate of stock issued by one authorized to issue certificates, and such in form and effect as he might lawfully issue, is a representation to the public that the certificate is duly executed, that all the necessary conditions existed which authorized its issue, and that the person named is the owner of the shares specified. The authority conferred upon officers or agents to execute and deliver certificates of stock is thus not a special, limited or conditional authority, but a general authority to represent and act for the corporation in this important matter, an authority to issue certificates as occasion requires, of which they are to judge, and to warrant the genuineness of such certificates. In *Shaw v. Port Phillip Gold Min. Co.*, 13 Q. B. D. 103, in which the corporation was held liable upon forged certificates issued by its secretary, who was one of the certifying officers, Stephen, J., says: "The company appear in this case to have prescribed certain formalities with regard to the use of the seal and the issue of certificates. The certificate is to be signed by a director and the secretary. In the present case it apparently does comply with these formalities; it is apparently so signed, and it is stated to be in the usual and authorized

form. The company made it the duty of the secretary to procure the preparation, execution, and signature of certificates with the prescribed formalities, and thereupon to issue them to the persons entitled to receive them. They thereby gave the secretary the opportunity of doing what he has done in this case. A person can inform himself whether the certificate comes from the secretary because he gets it from the secretary's office, but I do not see how, according to any practicable course of business, he can go behind the certificate and ascertain for himself such matters, or whether the signature of the director is genuine. It appears to me, therefore, that the company have authorized the secretary, and made it his official duty, to act in such a way that his acts amount to a warranty by them of the genuineness of the certificate issued by him."

The opinion of Matthew, J., is to the same effect: "I am of the same opinion, on the ground that the company is responsible for the fraud committed by its agent while acting within the ordinary scope of his employment. Upon the statements contained in the case I cannot doubt that it was within the scope of their secretary's employment to do what he did here. It is stated to have been the duty of the secretary to procure the execution of the certificate with the prescribed formalities, and to issue it to the person entitled thereto. It is ordinarily indispensable in the ordinary course of business that the secretary should perform these duties, and it never could have been contemplated that the purchaser of shares should himself ascertain that each of the prescribed formalities had, in fact, been complied with. It seems to me, therefore, that the secretary is held out by the company as their agent to warrant the genuineness of the certificate."

In support of these views in regard to the law of principal and agent as applied to the issue of certificates of stock, reference may be made to some analogous cases. Where the agent of a bank, authorized to certify checks, fraudulently certifies a check when the drawer has no funds, the bank will be liable to a *bona fide* holder of the check. *Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank*, 16 N. Y. 125; *Claffin v. Farmers' & Citizens' Bank*, 25 N. Y. 293; *Cooke v. State National Bank*, 52 N. Y. 96; *Morse v. Mass. National Bank*, 1 Holmes, 209; *Morse on Banking*, § 155 h. So an agent authorized to make or endorse negotiable paper in the name of his principal, can bind the principal by notes or indorsements in apparent execution of the power, but fraudulently made for the benefit of the agent. 1 *Daniels Neg. Int.*, § 284; *Swire v. Francis*, L. R., 3 App. Cas. 106. Where one member of a firm of warehousemen fraudulently issued receipts for grain, when no grain was received, the firm was held liable to the plaintiff who loaned money on the receipts. *Griswold v. Haven*, 25 N. Y. 595. Recitals in municipal bonds estop the municipality as against *bona fide* holders. *County of Warren v. Marcy*, 97 U. S. 96; *Township of Bernards v. Morrison*, 138 U. S. 528; 3 Am. R. R. & Corp. Rep. 35; *Chaffee County v. Potter*, 142 U. S. 855; 5 Am. R. R. & Corp. Rep. 336. In regard to bills of lading fraudulently issued by an agent for property, not received, the authorities are conflicting. The weight of authority favors the view that the principal is not liable in such cases, even to a *bona fide* holder for value. *Pollard v. Vinton*, 105 U. S. 7; *Friedlander v.*

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Railway Co., 130 U. S. 416; Second National Bank v. Walbridge, 19 Ohio St. 419; Hutchinson on Carriers, § 124, and cases cited; Mecham on Agency, § 717, and cases cited.

A number of well considered cases hold the contrary. *Batavia Bank v. Railroad Co.*, 106 N. Y. 195; *Brooke v. Railroad Co.*, 108 Penn. St. 529; *Sioux City R. Co. v. Bank*, 10 Neb. 556; *Savings Bk. v. Railroad Co.*, 20 Kan. 519; *Railroad Co. v. Larned*, 103 Ill. 293. In *Pollard v. Vinton*, 105 U. S. 7, a distinction is made between these cases and those relating to fraudulent stock certificates. See also *Baltimore & O. R. v. Wilkins*, 44 Md. 28. The remarks of the court in *Brooke v. New York, etc., R. Co.*, 108 Penn. St. 543; 1 Atl. Rep. 206, are quite pertinent to the present inquiry. "As between principal and third parties the true limit of the agent's authority to bind the former is the apparent authority with which the agent is invested; but as between the principal and the agent the true limit is the express authority or instruction given to the agent. *Evans*, Ag. 594, 606; *Adams Exp. Co. v. Schlessinger*, 75 Penn. St. 246. The principal is bound by all the acts of his agent within the scope of the authority which he held him out to the world to possess, notwithstanding the agent acted contrary to instructions; and this is expressly the case with the officers and agents of corporations. Since a corporation acts only through agents it is bound by its agent's contracts when made ostensibly within the range of their office. One who authorizes another to act for him in a certain class of contracts undertakes for the absence of fraud in the agent acting within the scope of his authority. *Whart. Cont.*, §§ 90, 190, 269.

"The authority of an agent to act for and bind his principal will be implied from the accustomed performance by the agent of acts of the same general character for the principal with his knowledge and consent. *Evans*, Ag. 198, note. These elementary principles are founded upon the doctrine that where one of two persons must suffer by the act of a third person, he who has held that person out as worthy of trust and confidence, and as having authority in that matter, should be bound by it. *Evans*, Ag. 591. It is conceded in this case that the company did not authorize the issuance of bills of lading without receipt of the goods; but it put Weiss in its place to do that class of acts, and it should be answerable for the manner in which he conducted himself within the range of his agency. Public policy, as well as the ultimate good of corporations themselves, requires that this should be the rule."

We also refer to the following cases in which analogous questions are passed upon touching the laws of principal and agent. *Commonwealth v. Reading Savings Bank*, 137 Mass. 431; *Holden v. Phelps*, 141 Mass. 456. *Whitney v. Wellington*, 10 Fed. Rep. 810; *Swift v. Winterbotham*, L. R., 8 Q. B. 244; *Barwick v. English Joint Stock Bank*, L. R., 2 Exch. 259; *British Mutual Banking Co. v. Charnwood Forest R. Co.*, 18 Q. B. D. 714.

13. When the issue of a fraudulent certificate of stock by an agent is within his apparent authority.—In order that a certificate of stock should be within the apparent authority of an officer authorized generally to issue certificates, it should be such in form and substance as he might lawfully issue in the regular course of business. It must purport to be signed by the proper officers and to be sealed with the corporate seal. It is the *act* of issuing the certificate as a complete and valid instrument that binds the cor-

poration and not the mere face of the instrument itself. Consequently, if the certificate does not purport to be signed by those who are the certifying officers *at the time of its issue*, it is not within the apparent authority of the agent who issues it. This would exclude certificates antedated and purporting to be executed by former officers, who are no longer in office and have no authority in the premises at the time of its issue. *Manhattan Life Ins. Co. v. Forty-second St., etc., R. Co.*, *post*. But see *Mutual Life Ins. Co. v. Forty-second St. & G. St. Ferry R. Co.*, 26 N. Y. S. 545, and sec. 4 of this note. It would doubtless also exclude certificates which lacked a necessary signature. See *Holbrook v. Faquier & Alex. T. Co.*, 3 Cranch C. C. 425.

14. Grounds of liability—subsequent acts of the corporation amounting to a ratification or representation of genuineness.—The cases of *Jarvis v. Manhattan Beach Co.*, 53 Hun, 862, and *Manhattan Beach Co. v. Harned*, 27 Fed. Rep. 484, illustrate this ground of liability. These cases are stated in section 7 of this note. If a corporation should, by mistake or fraud, represent a fraudulent certificate to be genuine, or recognize its validity by issuing a new certificate in its place, it would clearly be estopped to deny the validity of the certificate, as to one who had given value for it, relying upon such representation or recognition. *Mutual Life Ins. Co. v. Forty-second St. & Grand St. Ferry R. Co.*, 26 N. Y. S. 545. This would be a ground of liability entirely disconnected with the issue of the certificate and one which we shall not elaborate upon.

15. Remedy and damages.—Where a corporation is estopped from denying the validity of certificates, it may be compelled to recognize them as valid, if that is possible, and if that is impossible, to respond in damages to the parties injured. *Tome v. Parkersburg Branch R. Co.*, 39 Md. 30; *Allen v. South Boston R. Co.*, 150 Mass. 200; 22 N. E. Rep. 917; *New York, etc. R. Co. v. Schuyler*, 34 N. Y. 30; *Titus v. Turnpike Road*, 61 N. Y. 237; *Jarvis v. Manhattan Beach Co.*, 53 Hun, 862; *Willis v. Fry*, 13 Phila. 33; *Bank v. Lanier*, 11 Wall. 369; *In re Bahia & San Francisco R. Co.*, L. R., 3 Q. B. 584; *Tompkinson v. Balkis Consolidated Co.* 2 Q. B. 616 (1891); *Davis v. Bank of England*, 2 Bing. 392; *Hunter v. Westminster Internal Improvement Coms.* 14 Eng. L. & Eq. 379; *Mandlebaum v. North Am. Min. Co.* 4 Mich. 465; *Citizens' Natl. Bank v. Cincinnati, etc. R. Co.* 29 Weekly L. B. 15.

In case of a suit for damages, the measure of damages is held to be the value of genuine stock at the time when the corporation first refused to recognize the validity of the certificates sued on, with interest, not exceeding, in case of a pledge, the amount of the loan with interest. *Allen v. South Boston R. Co.* 150 Mass. 200; *In re Bahia & San Francisco R. Co.* L. R. 3 Q. B. 584; *Tome v. Parkersburg Branch R. Co.* 39 Md. 36. But see *Willis v. Fry*, 13 Phila. 33.

The officers and agents who have been guilty of the fraud are personally liable to those who have sustained injury thereby. *National Exchange Bank v. Sibley*, 71 Ga. 726; *Bruff v. Mali*, 36 N. Y. 200; *Cazeaux v. Mali*, 25 Barb. 578; *Shotwell v. Mali*, 38 Barb. 445; *Fairbanks Executors v. Humphrys*, L. R. 18 Q. B. D. 54. They are also liable to the corporation for the damages sustained by it, in consequence of their fraudulent acts. *Bank of Kentucky v.*

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Schuylkill Bank, 1 Parson's Select Cases, 180; Rutland R. Co. v. Haven, 62 Vt. 39; 19 Atl. Rep. 769; Metropolitan R. Co. v. Kneeland, 120 N. Y. 134; 2 Am. R. R. & Corp. Rep. 502.

The fact that the plaintiff may have transferred the certificates and received them back after a discovery of the fraud, will not affect his right of recovery. *Jarvis v. Manhattan Beach R. Co.* 53 Hun, 362; *Farrington v. South Boston R. Co.* 150 Mass. 406. This point is also expressly decided in the principal case.

16. Remedy of the corporation to cancel fraudulent stock and to adjust the rights and equities of the holders.— Without discussing the question of when the corporation can maintain a bill against all the holders of fraudulent certificates, where a large number have been issued, to have the same canceled and the rights of the holders ascertained and adjusted, we refer to the cases in which such bills have been filed and sustained. *New York, etc. R. Co. v. Schuyler*, 17 N. Y. 592; 34 N. Y. 30; *Cincinnati, etc. R. Co. v. Citizens' National Bank*; 22 Weekly L. B. 248; 24 Weekly L. B. 198; 29 Weekly L. B. 15.

MANHATTAN LIFE INS. CO. v. FORTY-SECOND & G. ST. FERRY
R. CO.

(Court of Appeals of New York, October 8, 1893.)

1. CORPORATIONS. LIABILITY FOR FORGED CERTIFICATE OF STOCK ISSUED AND PLEDGED BY THE PRESIDENT AS COLLATERAL TO A PERSONAL LOAN. The president of a company took a blank certificate of stock, signed by a former president, since deceased; dated it back seven years; forged the signature of the then treasurer, also deceased; signed his own name, as the then secretary and transfer agent; and filled in his own name as stockholder. This instrument he used as collateral in obtaining a loan. Held that, all three signatures being in law forgeries, his office as president clothed him with no such apparent authority as to make the company liable on the certificate.

2. EFFECT OF PRESIDENT'S REPRESENTATIONS THAT CERTIFICATE GENUINE. The president of a company, offering a certificate of stock therein as collateral for a loan to himself individually, does not bind the company by his representations that the certificate is genuine.

ACTION by the Manhattan Life Insurance Company against the Forty-Second & Grand Street Ferry Railroad Company for money loaned to one Eben S. Allen. From a judgment of the general term (19 N. Y. Supp. 90) affirming a judgment dismissing the complaint, plaintiff appeals.

Hoyt & Schell (*Artemas H. Holmes*, of counsel), for appellant.
Freling H. Smith, for respondent.

MAYNARD, J. In September, 1888, Eben S. Allen, the president of the defendant, a domestic railroad corporation, forged a certificate of 100 shares of its stock, of the face value of \$10,000, and pledged it as collateral security to the plaintiff for a personal loan of \$6,500, which he then obtained. Default was made in the payment of the debt, and the plaintiff seeks to make the defendant liable for the amount of the loan, which is less in amount than the value of the stock, if had been a genuine issue, and which represents the loss of the plaintiff by the fraud of the defendant's president. The certificate bore date November 10, 1881. At that time John Green was president, Charles Curtiss, treasurer, and Allen, secretary and transfer agent of the defendant company. The certificate was one of the printed or engraved forms used by the defendant, which had been cut from its blank certificate book in 1881, and signed in blank by Green, and left with the other officers of the company at a time when he was to be absent from the office for some months. It was intended for convenient use in case a stockholder desired to transfer his stock in the president's absence, and to have a new certificate issued to the transferee. Allen obtained possession of it, and kept it in his private drawer until 1888, when he filled up the blanks, dating it November 10, 1881, inserting his own name as stockholder, forging the name of Curtiss as treasurer, and signing his own name as transfer agent. Green ceased to be president in April, 1883, and at the same time Curtiss ceased to be treasurer. Allen was secretary and transfer agent from 1868 to April, 1888, and treasurer from 1883 to April, 1888, when he became president, and Ralph J. Jacobs became treasurer, and Charles P. Emmons, secretary and transfer agent. When Allen issued the certificate in September, 1888, both Green and Curtiss were dead, and every name attached to it was in a legal sense forged. While the signatures of Green and Allen were genuine, they were not then the officers of the defendant, which the certificate represented them to be, and the act of making and uttering the instrument was a forgery as to all the names written thereon, under sections 519 and 522 of the Penal Code. It is thus very plain that, as president in 1888, Allen had no authority, either actual or apparent, to issue the certificate of stock upon which this action is brought. The company had not invested him with any power as its then president to participate

in the creation of certificates bearing date seven years previous. The authority which he possessed in 1881, as secretary and transfer agent, had then ceased to exist; and no state of circumstances has been suggested or can be conceived under which he was empowered to countersign the certificate as transfer agent in 1888, and antedate it as of the time when he held that office.

The rule which imposes a liability upon the principal for the unauthorized acts of his agent is founded upon public policy, and is well defined. It is limited to cases where there was an apparent authority to do the act in question, and it appeared to have been done in the course of his employment as agent, and was within the scope of his general powers. None of these grounds of liability have been shown here. The agency did not exist in 1888, which was necessary in order to deprive the principal of the right to disclaim responsibility for the unauthorized act. With respect to the creation of certificates bearing date in 1881, he was as destitute of authority as if he had been a stranger to the corporation. He not only could not issue them, but he could take no part in their issue, or do any act required by law or by the by-laws essential to give them validity. When he issued such a certificate in his own name, he was not apparently acting within the scope of any general authority conferred upon him by the corporation. The defendant cannot justly be held liable for the misuse of a power which it never created. This case has no feature in common with the Fifth Avenue Bank against the same defendant, 137 N. Y. 231; 33 N. E. Rep. 378. There Allen, at a time when he was treasurer and transfer agent, and invested with authority in both capacities to sign, countersign and seal valid certificates of stock, forged the name of the president to a certificate, and issued it to a confederate who negotiated a loan upon it at the bank, which, before receiving it, caused inquiry to be made at the office of the defendant, and was informed that the certificate was genuine. Allen was there acting within the scope of his apparent authority, and whether the certificate had been actually signed by the president, and was issued in the regular course of the administration of the affairs of the company, were facts peculiarly within his knowledge, and the countersigning and issue of the certificate in due form was a representation by him that these conditions had been complied with, and that the facts existed upon which his

right to act depended. Here there was a total lack of delegated power to Allen to do a single lawful act in the issue of the certificate in the form in which it was presented to the plaintiff. There was no negligent or wrongful use by him of any authority derived from the defendant. It was a willful and criminal act, perpetrated for private gain, and not connected with the exercise of any official authority, or semblance of authority, which he possessed as the defendant's agent.

The plaintiff insists that there is another ground upon which a recovery is permissible. When Allen made the loan, and pledged the forged certificate, he represented to the plaintiff that it was a genuine certificate of the stock of the corporation; and, as he was then its president and chief administrative officer, the claim is made that the defendant is bound by his representations. This question, in its general bearings, was discussed at great length by counsel in the Fifth Avenue Bank Case, but we refrained from considering or deciding it, because not necessary to the decision of the case, and we do not think that it is involved in the present appeal. Allen, when he negotiated the loan, was not engaged in the transaction of the defendant's business, or in the discharge of any duty imposed upon him by the defendant. The declarations of an agent are only admissible against his principal when made as a part of a transaction undertaken in behalf of the principal, or in the performance of the duties of his agency. *First Nat. Bank of Lyons v. Ocean Nat. Bank*, 60 N. Y. 278. Or, as is sometimes stated, the representations of the agent, when not expressly authorized by the principal, must, in order to bind him, be within the scope of his agency, which is but another form of expressing the same proposition. *Trust Co. v. Beebe*, 7 N. Y. 364. But without determining what are the duties of the officers of a corporation, when called upon to respond to the inquiries of intending purchasers of the stock, there is sufficient reason why the plaintiff cannot avail himself of the representations of Allen in regard to the genuineness of this certificate. They were made in a private and personal transaction, undertaken for his individual benefit, and so understood by the plaintiff. The plaintiff knew that Allen, in the negotiation of the loan, was not acting as the officer or agent of the defendant or in its behalf, and that his personal interest in the transaction might lead him to betray

his principal. It is an old doctrine, from which there has never been any departure, that an agent cannot bind his principal, even in matters touching his agency, where he is known to be acting for himself or to have an adverse interest. *Stone v. Hayes*, 3 Denio, 575; *Bentley v. Insurance Co.*, 17 N. Y. 423; *Clafin v. Bank*, 25 N. Y. 293; *Wilson v. Railroad Co.*, 120 N. Y., 145; 24 N. E. Rep., 384; *Moore v. Bank*, 111 U. S. 156; 4 Sup. Ct. Rep. 345; *Farrington v. Railroad Co.*, 150 Mass. 406; 23 N. E. Rep. 109. The plaintiff in such a case assumes the risk of the agent's disloyalty to his trust, and has no occasion for surprise when he discovers that the agent has served himself more faithfully than his principal. The learned trial judge correctly decided when he held that, under the proofs, the certificate of stock was not admissible as evidence of the defendant's liability, and dismissed the complaint; and the judgment and order appealed from must be affirmed, with costs. All concur. Judgment accordingly.*

FRAUDULENT AND IRREGULAR STOCK CERTIFICATES—THE QUESTION OF THE GOOD FAITH OF ONE TAKING SUCH CERTIFICATES FOR VALUE.

1. In general.—In the note to the last case we have considered under what circumstances a corporation would, and would not, be liable to an innocent holder for value of a certificate of stock which turned out to be fraudulent or irregular. It is the object of the present note to consider what constitutes one an innocent holder, or what will be sufficient to put one upon inquiry as to the validity of such certificates. Of course every person about to give value for a certificate of stock must, at his peril, take notice of all those facts and conditions which would render it void in the hands of an innocent holder. He must take notice of what is necessary to make an *apparently* good certificate and must, therefore, see that it *purports* to be executed by the proper officers and in a proper manner. If it does not have these indicia of genuineness, he is put upon inquiry, and charged with notice of what inquiry would have revealed. *Holbrooke v. Faquier & Alex. T. Co.*, 3 Cranch C. C. 425. If it has the indicia of genuineness, he must still further see, either that the signatures and seal are genuine, or that it has been issued by an officer authorized to issue certificates precisely similar in form. See note to last case.

We believe there is no question about these propositions. What we wish to consider in this note is this question: Where fraudulent or irregular certificates of stock bear upon their face all the indicia of genuine certificates and either have the genuine signatures of the proper officers and seal of the

*Reported in 34 N. E. Rep. 776.

corporation, or have been issued by an officer or agent having authority to issue like certificates, what circumstances will be sufficient to charge a person with notice that such certificates are fraudulent or irregular.

2. Effect of the words in the certificate that "it is transferable only on the books of the corporation upon surrender of this certificate."—The practice of providing that stock shall be transferrable only on the books of the company on surrender of the old certificate and of incorporating such provision into the certificate, is almost universal. The issue of a certificate of stock, by the authorized transfer agent, is an implied representation that these things have been done, or, at least, that the necessary conditions have been performed which authorized it to be issued. We have discussed this proposition at length in the last note and shall regard it as established for the purposes of this one. See § 12. The provision in the certificate is one which in terms applies to the *transfer* of stock, and not to the *issue* of certificates. It applies to "this certificate" and to the transfer of the stock represented by "this certificate," that is, the particular certificate in question. It is a provision which is *prospective* in its operation, and not *retrospective*. It, in terms, refers to a future transfer of the stock represented by "this certificate" and to the future disposition of such certificate. It seems designed for the protection of the holder of the certificate against unwarranted transfers by the corporation, and for the protection of the corporation against the risk of a transfer with the certificate outstanding, and also for preserving a record of the title to stock, rather than for a protection against the issue of fraudulent certificates. *Bank v. Lanier*, 11 Wall. 369, 378; *Knox v. Eden Musee American Co.*, 25 N. Y. S. 164.

The provision in question does not necessarily imply that "this certificate" was issued upon a transfer of the stock it represents, for it might, so far as the certificate would show, have been issued to an original subscriber, or to a purchaser of stock which the corporation had acquired by purchase, forfeiture or otherwise, or in place of a lost or stolen certificate. If it be said that the provision in the certificate points to the rule or regulation, if one exists, that no transfer of stock can be made except on the books of the corporation on surrender of the old certificate, and that the provision is notice of such rule and regulation, still it does not give notice that the particular certificate was issued upon a transfer, or pretended transfer of stock, or that no valid certificate could be issued except in case of a transfer in the manner required. As the certificate is not notice that it was issued upon a transfer or pretended transfer of stock, and as it might have been lawfully issued under other conditions, the provision could not in any event require any investigation of one who did not know, *aliunde*, that it was issued for the purpose of a transfer. The provision in question could not, therefore, impose any duty of investigation upon one taking a certificate in the ordinary course of business from the person to whom it was issued or from some subsequent holder. Ordinarily a person would not know that a certificate was issued upon a transfer unless it was issued directly to himself in a transaction involving such transfer. The question then is whether a person who contracts for a transfer of stock to himself and receives a certificate with the words in question appearing on its face, is

bound to inquire whether a transfer has been made on the books and a previous certificate surrendered. If the words themselves require this in one case they must in all cases. But we apprehend that no one would claim that such investigation was necessary where the transaction was with a stranger to the corporation, or with any one but the agent authorized to issue certificates. In *Allen v. South Boston R. Co.*, 150 Mass. 200, it appeared that one Reed, treasurer and transfer agent of the defendant company, ordered Henshaw & Co., stockbrokers, to sell for him ten shares of stock in the defendant company. The plaintiff bought these shares of the brokers and received from them a blank power of attorney for the assignment of the stock, which he took to Reed, and received from him a certificate in the usual form and containing the usual provision as to a transfer on the books and surrender of "this certificate." The plaintiff was ignorant of Reed's interest in the matter, and acted in good faith. Reed had no stock and the certificate was fraudulent, he having filled out a certificate signed in blank by the president, and made false entries of transfer in the books to correspond. The corporation having repudiated the certificate, the plaintiff brought suit for damages and recovered. The transaction was carried out in all respects according to the general custom of brokers in Boston. The court says: "The ground on which a corporation is liable to a *bona fide* purchaser for value of false certificates of its stock issued under its seal, signed by the proper officers, and apparently genuine, is that the certificates are statements by the corporation of facts which it is its duty to know, and which cannot well be known to the purchaser. It is the duty of the proper officers of the corporation to ascertain that its stock has been transferred in accordance with its by-laws, and in accordance with law, before they issue a new certificate. The transfer, which must be made on the books of the company, must be made by the owner of the old certificate, or by his attorney for him. The surrender of the old certificate must also be made by him or by his attorney. There is no provision that it shall be made by the purchaser, as the assignee or attorney of the seller. If the seller undertakes with the purchaser to make the surrender and the transfer on the books of the company, the only thing left for the purchaser to do is to call upon the corporation for the new certificate. We see no good reason for holding that there is a duty on the part of the purchaser towards the corporation, to see to it that the seller of stock surrenders his certificate and transfers it on the books of the corporation. That is the duty of the corporation towards both the seller and the purchaser before it issues a new certificate. * * *

A purchaser of stock violated no duty to the corporation when he trusted to the seller to make the assignment and the surrender of the old certificate. The utmost that can reasonably be contended is, that the fact that a certificate was not exhibited and delivered with a power of attorney to the purchaser was a circumstance to be considered upon the question whether the purchaser acted in good faith and with due care."

There is no case which holds that it is the duty of one taking a transfer of stock from a stranger to the corporation, or from anyone but its transfer agent, to ascertain that a transfer is made on the books or a previous certificate surrendered. The language used in *Moores v. Citizens' National Bank*, 111 U. S. 156, 165, may be broad enough to include such a case but the decision of

the court does not necessarily do so. In that case Moores was one of the certifying officers of the defendant and authorized to issue certificates. The plaintiff loaned money to Moores on the security of stock in the corporation, which he represented that he owned, and received a certificate issued directly in her own name. This certificate was fraudulent, and it was held under all the circumstances that the plaintiff was not a holder in good faith. The court says: "The certificate which he delivered to the plaintiff was not in his name, but in hers, stating that she was entitled to so much stock, and showed upon its face, that no certificate could be lawfully issued without the surrender of a former certificate and a transfer thereof upon the books of the bank. * * * The very form of the certificate was such as to put her upon her guard. She was not applying to the bank to take stock, as an original subscriber or otherwise; but she was bargaining with Robert D. Moores for stock which she supposed him to hold as his own. She knew that she had not held or surrendered any certificate, and she never asked to see his certificate or a transfer thereof to her; and he in fact made no surrender to the bank or transfer on its books. She relied on his personal representation, as the party with whom she was dealing, that he had such stock; and she trusted him as her agent to see the proper transfer thereof made on the books of the bank. Having distinct notice that the surrender and transfer of a former certificate were prerequisites to the lawful issue of a new one, and having accepted a certificate that she owned stock, without taking any steps to assure herself that the legal prerequisites to the validity of her certificate, which was to be fulfilled by the former owner and not by the bank, had been complied with, she does not, as against the bank, stand in the position of one who receives a certificate of stock from the proper officers without notice of any facts impairing its validity."

This language, however, must be taken in connection with the facts of the case, and, as thus qualified, can mean no more than that, where a person takes stock directly from the transfer agent of a corporation, which the latter claims to own, and proposes to sell or give as security, he is "put upon his guard" by this provision in the certificate, and is bound to make the inquiry which the provision suggests. But it seems to us that the substantial ground of the decision is that Moores was exercising for his personal benefit a power conferred upon him as agent of the corporation, and the plaintiff was, for that reason, put upon her guard, and was bound to see, or at least to use ordinary prudence to ascertain, that the agent was not abusing his power. We shall consider this question in a subsequent section.

3. Effect of certificate being issued in name of certifying officer.— In so far as the precise question has been passed upon, the decisions are uniform to the effect that a certificate of stock issued in the name of a certifying officer is not sufficient to raise any suspicion of fraud or wrong, and that a person taking such a certificate without inquiry is not guilty of bad faith or negligence. The question is elaborately considered by the general term of the superior court of Cincinnati in the case of *Citizens' National Bank v. Cincinnati, etc., R. Co.*, 29 Weekly L. B. 15. Certificates were to be signed by the president and secretary. The latter fraudulently issued certificates in his own name, which he used as collateral security for loans made for his own benefit. The holders made no inquiry, but relied upon the certificates. The trial court

held that the fact of the certificates being in the name of the secretary, who was borrowing the money, was sufficient to put the holders upon inquiry, and that they were not therefore holders in good faith, and could assert no claim against the corporation. The statute under which the corporation was organized required the president and secretary to be stockholders. The decision of the trial court was reversed on appeal, and the court, after referring to the statutes, says:

“ In view of these provisions of the statutes it may be confidently asserted; (1) that Doughty was required to be a stockholder in order to be secretary; (2) that there was no limit upon the quantity of stock he could hold; (3) that the form of the body of the certificate was not prescribed by the statute, but was left open to be determined by the by-laws or regulations; (4) that Doughty was entitled precisely the same as any other person to a certificate or certificates showing the true amount of stock he held, and that no certificate would sufficiently evidence title to stock unless it bore the signatures of the president and secretary; and (5) that the corporation had the undoubted right to have prescribed a form of certificate for its officers, including Doughty, different from that issued to stockholders generally, by requiring the signatures of other officers in addition to those of the president and secretary.

“ In view of the foregoing circumstances there would seem upon principle to be no controversy, as to what the law should be as to requiring purchasers of certificates of stock running in favor of either of these officers to make inquiry whether the issue of the certificate was fraudulent or not.

“ As the corporation had power to require that the ownership of the shares of the secretary or president should be evidenced by signatures of other officers in addition to those of the secretary and president; and as the corporation deliberately adopted the one form of certificate to evidence alike the ownership of shares by those who were officers and by those who were not, it must necessarily follow as a proposition beyond dispute that the corporation regarded its interests as fully protected from the fraudulent issue of certificates by either the secretary or president, (1) by the character of the men whom it elected to fill these offices; (2) by the check upon each officer which the required signature of the other gave; (3) by the taking from each officer a large bond for the faithful discharge of the duties of his office. And we are clearly of the opinion that it may also be affirmed as a proposition beyond dispute, that these safeguards which the corporation upon mature deliberation, has adopted, and regards as a sufficient protection to it from the fraudulent issue of certificates by its secretary and president, may as against the corporation also be accepted as sufficient by third persons who deal in its certificates; and that such third persons are in no way wanting in good faith towards the corporation because notwithstanding the fact that the certificates bear the genuine seal of the corporation and the genuine signatures of the corporate officers, they do not inquire of such officers whether such seal and signatures have honestly and properly been thereto attached; or that such third persons are wanting in good faith towards the corporation because they do not inquire of the corporation, as distinct from their officers, whether they are aware that such certificates have been issued and are about to be acted upon as genuine.

“ That the signatures of Doughty and Cook, and the genuine seal of the cor-

poration, were considered by the corporation a sufficient guaranty which made no inquiry necessary when the certificate was in favor of either Doughty or Cook, receives the very strongest confirmation when it is considered that the corporation had made no provision for such inquiry of any of its officers other than Cook and Doughty. If inquiry was not to be made of Cook and Doughty, of whom was it to be made? Of any one of the directors? There is nothing in the constitution or by-laws or the course of business of the corporation that would give the slightest support to such a claim, nor make the answer of such a single director binding upon the company. Inquiry in that direction then was not contemplated by the corporation, and would have been unprofitable.

“Should inquiry have been made of the board of directors? If so, then the transfers of stock owned by the president and secretary were to be subject to the restriction that they could only be made at the time of the meetings of the board of directors; because at no other time would there be an opportunity offered for making such inquiries. But we look in vain through the by-laws for anything that would warrant us in supposing that the transfers of stock owned by the president and secretary were subject to any such limitation.

“Inquiry, then, if made, would have to be made of Doughty or Cook. But why inquire of Doughty if the dealing was with him? Surely his offer of the certificates as collateral security was an assurance so far as he was concerned that they were genuine. And why inquire of Cook? Was not his signature genuine, and had he not already said under that signature that the certificate was valid?”

Titus v. Turnpike Road, 61 N. Y. 237, is a precisely similar case, in which the same conclusion was reached, upon substantially the same grounds. Some stress is laid in this case upon the fact that the certificates were not signed by the party in interest alone, and this fact is held to distinguish it from some other cases in which similar acts were held to be void or voidable. To the same effect is the case of Western Maryland R. Co. v. Franklin Bank, 60 Md. 36, in which an agent of the defendant company fraudulently issued refunding certificates in his own name and disposed of them in the market. See, for a further statement of the case, § 6 of last note. Upon the point in question the court says: “In the first place, it is distinctly admitted that the plaintiff in these actions, took the certificates in the regular course of their business, *bona fide*, for value, and without any notice whatever, and that they had no ground for suspicion of fraud. The certificates were dealt in by bankers and brokers, and they were among the securities on the stock and money market of the city. And among those dealing in them, the title was regarded as passing upon delivery. Indeed, it appears to have been designed by the defendant that the holders or transferees of such certificates should be relieved from the necessity of having written transfers made on the books of the corporation, and that the certificates should pass title by mere delivery; for we find that the original parties to whom certificates issued were required to sign a receipt, and also a general assignment to any person who should be holder; and the defendant paid interest to any such holder without other assignment than the original general assignment in the certificate book; regarding that as sufficient. And such being the case, why should

parties dealing in such certificates in a regular course of business, without ground of suspicion, be restricted in their right to purchase or advance upon such certificates, because they happen to be in the hands of a party who is an agent of the company, or because they happen to represent on their face that the coupons had been deposited by such person? We can perceive no good reason for such a distinction. Such facts were not sufficient, of themselves, to discredit the certificates, or to require of innocent third parties to act upon the presumption that they were false and fraudulent. It was the right of the party disposing of the certificates, though an agent of the company, to own or acquire coupons or coupon certificates, and it was equally his right, as of other people, on the terms proposed by the company, to deposit such coupons and obtain a certificate therefor, in the ordinary form. And, if that be so, he certainly had a right to sell such certificate in the market, in the ordinary way. It has been held repeatedly that purchasers of stock are not bound to look beyond the certificates, or to examine the books of the corporation, to ascertain the validity of the transfer (*Lowry v. Com. & Farm. Bank*, Taney, U. S. Circ. Ct., Dec 310), and we perceive no reason why the same principle should not be applied to coupon deposit certificates, such as those in question here." Pp. 47-48.

It is to be noted, however, that in this case the party named in the certificate was not a certifying officer, and although it was found as a fact that he had authority to issue such certificates, procuring the signatures of the proper officers thereto, yet the certificates themselves afforded no evidence of this fact or of the fact that he had anything whatever to do with their issue.

See also *Hill v. C. F. Jewett Pub. Co.*, 154 Mass. 172; 28 N. E. Rep. 142; *Willis v. Fry*, 13 Phila. 33; *Citizens National Bank v. Cincinnati, etc., R. Co.*, 29 Weekly L. B. 15, which are commented upon in the next section.

It is an undoubted rule that an officer or agent of a corporation has no authority to use the corporate property for the payment of his individual debts or to otherwise dispose of it for his own benefit. *Dowd v. Stephenson*, 2 Am. R. R. & Corp. Rep. 305; *Wilson v. Met. El. R. Co.*, 120 N. Y. 145; *Garrard v. Railroad Co.*, 29 Penn. St. 154; *Shaw v. Spencer*, 100 Mass. 388. Anyone who thus knowingly receives the property of a corporation does so at his peril and subject to the right of the corporation to recover the same or its value, if the transaction was not authorized. *Ibid.* It is also equally well settled that an officer or agent cannot bind the corporation by a contract made with himself and any such contract is void, unless expressly authorized or ratified by the corporation. *Claffin v. Farmers & Citizens' Bank*, 25 N. Y. 298; *Chemical National Bank v. Wagner* (Ky.), 20 S. W. Rep. 535; *Mallory v. Mallory-Wheeler Co.*, 61 Conn. 131; 5 Am. R. R. & Corp. Rep. 509; *Miner v. Belle Isle Ice Co.*, 93 Mich. 97; 6 Am. R. R. & Corp. Rep. 660; *Wilbur v. Lynde*, 49 Cal. 290; *Chouteau v. Allen*, 70 Mo. 338; *Pratt v. Dwelling-House Mut. Fire Ins. Co.*, 53 Hun, 101; *Bank of New York v. Am. Dock & Trust Co.*, 24 Y. S. 406, 7 Natl. Corp. Rep. 30; *West St. Louis Savings Bank v. Shawnee County Bk.*, 95 U. S. 557; *Gallery v. Natl. Exchange Bank*, 41 Mich. 169; *Chamberlain v. Pacific Wool Growing Co.*, 54 Cal. 103; 1 Mor. Corp., § 517; 1 Daniels Neg. Ints., § 282. Where the contract is in writing and shows upon its face that it is made by the agent with himself, and the same was not in

fact authorized, the contract is void in the hands of any one who takes it by assignment or transfer, even though it is in form a negotiable instrument. *Claffin v. Farmers & Citizens' Bank*, 25 N. Y. 298; *Chemical National Bank v. Wagner* (Ky.), 20 S. W. Rep. 535; *Bank of New York v. Am. Dock & Trust Co.* 24 N. Y. S. 406, 7 Natl. Corp. Rep. 30. In the first of these cases, G. W. Houghton, who was president of the defendant bank and had authority to certify checks, drew two checks upon the bank to the order of C. A. Cleveland, and certified them as president. Cleveland paid Houghton full value therefor, and afterwards endorsed and transferred them to the plaintiff, who also paid their face value, and took them without notice of any defect not appearing on their face. In a suit upon the checks, it was held that Houghton had no authority to certify his own checks, and that as the checks showed this want of authority on their face, the plaintiff was not a *bona fide* holder, and the bank was not liable. The court says: "It is conceded, in the opinion of the supreme court in this case, that, as between the bank and Mr. Houghton, the certificate of acceptance of the latter would not be obligatory. But that court supposed that a subsequent *bona fide* holder could, nevertheless, avail himself of such certificate. The difficulty in the way of this conclusion, however, is, that the want of authority in Mr. Houghton to bind the bank appeared upon the face of the check. There could be no *bona fide* holder of such an instrument. An endorser of commercial paper may, it is true, very frequently acquire rights superior to those of the original party; but never, so far as I am aware, when he has notice of the defect. If he knows the facts which would render the paper void in the hands of the party from whom he derives title, he cannot recover. The supreme court seems to have supposed that to prevent the plaintiffs from being considered as *bona fide* holders, they must have known that the drawer had no funds in the bank to meet the check. This was clearly an error. The acceptance was void in the hands of the drawer, irrespective of the question whether he had, or had not, such funds. The double relation in which Mr. Houghton stood alone rendered it void, and of this the plaintiffs were apprised by the check. It could not be necessary that they should have had notice of any other fact in order to defeat their recovery; as the same facts which render commercial paper void in the hands of the original party, will equally avoid it in the hands of any subsequent holder having notice of such facts."

In the case of *Chemical Nat. Bank v. Wagner*, (Ky.) 20 S. W. Rep. 535, the treasurer of a corporation, having no authority whatever to do so, executed notes of the corporation, signed by himself as treasurer and payable to himself individually. These notes were endorsed and negotiated, and came through an intermediate holder into the hands of the plaintiffs, who were *bona fide* holders, except as affected by the notes themselves. The court held that they could not recover. "The notes bear upon their face," says the court, "the conclusive evidence of the fact that they were issued by Mr. Mathers, as agent, to himself, as principal, which was notice of itself to appellants that the notes were void at the instance of the company, which destroyed their immunity as innocent purchasers; consequently they could not recover thereon, unless they could show that the company, by its superior officer, authorized so to do, or its board of directors, with like authority, authorized Mr. Mathers

to issue the notes, because the appellants being *prima facie* not innocent purchasers, the notes being void upon their face, they, in order to entitle them to recover from the company, must show that they were issued rightfully and properly by the company's agent, which they have failed to do."

In the case of *Bank of New York v. Am. Dock and Trust Co.*, N. Y. S., ; 7 Natl. Corp. Rep., 80, the president of a warehouse company made a receipt to himself individually and pledged it to the plaintiff bank as security for a loan on his own account. The receipt was false and fraudulent, and it was held that the corporation was not liable upon it. The court says "that, where what purports to be the company's contract shows upon its face the officer's use of his official position for his own benefit, everyone to whom the contract comes is put upon inquiry."

Thus in the case of a promissory note, or warehouse receipt, or certified check, if it appears upon the face of the instrument that it was made by an officer or agent of a corporation in favor of himself individually, it is *prima facie* void in the hands of any person to whom it may come. It is immaterial whether such person takes it directly from the officer or from some intermediate holder. He is bound to ascertain whether the act of the officer was in fact authorized, and he takes the instrument at his peril if he does not.

It is certainly a difficult matter to find any difference which will distinguish these cases from the issue of stock certificates by an officer to himself. The only distinction suggested is in the last case cited, relating to warehouse receipts, where it is said, referring to the stock certificate cases, "There is a plain distinction between the present case and these cases where the instrument simply acknowledged the officer's interest in the company." According to the authorities, if the proper officer of a corporation executes the corporation's note to himself it is *prima facie* void, but if he issues a stock certificate to himself it is *prima facie* valid. In one case he causes the corporation to promise to pay himself a certain sum of money; in the other he causes it to certify that he owns a certain amount of its capital stock. In both cases he exercises a power vested in him as agent for his personal benefit. Both cases seem to be equally within the general rule that precludes an agent from representing both his principal and himself in a matter in which he has a private interest. *Mecham on Agency*, §713; 1 *Mor. Corp.*, 517. As said in the principal case: "It is an old doctrine, from which there has never been any departure, that an agent cannot bind his principal, even in matters touching his agency, where he is known to be acting for himself or to have an adverse interest." When an officer issues certificates of stock to himself, he is clearly acting for himself and in a matter where he has to a certain extent, an adverse interest, for a certificate of stock imposes obligations upon the corporation in favor of the holder. Nothing could make the officer's personal interest in such case more manifest than the certificate itself. It may be doubted, therefore, whether such certificates should not be deemed *prima facie* invalid, and to impose upon one taking them the burden of investigation. There would certainly seem to be no reason why certificates of stock should be more favored in this respect than negotiable paper itself. The subject is further considered in the next section.

4. Where the false certificates are received directly from the officer issuing them for a consideration moving to him, or in a transaction in which he is known to have a personal interest.—In *Moore v. Citizens' National Bank*, 111 U. S. 156, it appeared that Robert B. Moore was cashier of the defendant bank and one Dorsey was its president, and they were authorized to issue and transfer stock. Robert and his father were in business together and the plaintiff agreed to loan them \$9,100 for use in their private business, and they agreed to give her as security a certificate for ninety-one shares of stock in the defendant bank, which Robert represented that he owned. He sent her a certificate for the shares made out in her own name and received the money. The certificate stated on its face that it was transferable only on the books of the bank on the surrender of the certificate. No prior certificate had been exhibited to the plaintiff and she made no inquiries. As matter of fact the certificate was entirely fraudulent, the cashier having filled out a certificate signed in blank by the president and left with the cashier to be used if needed. It was held that the bank was not liable to the plaintiff. After reviewing the cases the court says: "This review of the cases shows that there is no precedent for holding that the plaintiff, having dealt with the cashier individually, and lent money to him for his private use, and received from him a certificate in her own name, which stated that shares were transferable only on the books of the bank and on surrender of former certificates, and no certificate having been surrendered by him or by her, and there being no evidence of the bank having ratified or received any benefit from the transaction, can recover from the bank the value of the certificates delivered to her by its cashier." The court laid great stress on the words in the certificate that stock was transferable only on the books of the bank on surrender of former certificates. We have commented on this feature of the case in section 2 of this note. At the foundation of the decision is the fact that the plaintiff "dealt with the cashier individually and lent money to him for his private use." When the cashier delivered to her a certificate of stock, signed and issued by himself, as security for his own debt, it was manifest that he had been using his authority as agent in a matter where he had a personal interest. The decision of the lower court was put distinctly upon the ground that, "the plaintiff having had knowledge of the fact that Moore, upon whom she relied to have the stock transferred to her, was acting for himself as well as in his capacity of cashier—that is, acting for the bank upon one side and for himself on the other, in reference to the matter of issuing this certificate—she is not, in the judgment of this court, an innocent holder of the stock."

Farrington v. South Boston R. Co., 150 Mass. 406, is a case very similar to the foregoing. One Reed was treasurer of the defendant company. He and the president were vested with authority to issue stock certificates. Reed borrowed money of the plaintiff and gave him as security a certificate of stock in the defendant company, made out in the name of the plaintiff. The certificate was fraudulent, Reed having filled out a certificate signed in blank by the president. It was held that the corporation was not liable, and the grounds are thus stated: "The plaintiff, in the case at bar, knew that he was dealing with the treasurer of the defendant in his personal capacity as a borrower of

money. If the by-laws of the company had provided that certificates of stock should be signed only by the treasurer, and if he was charged with the duty of attending to the transfer of stock and the issuing of certificates, any person lending money to him for his private use, and taking in his own name a certificate of the company's stock as collateral security, would reasonably be required to investigate the title of the treasurer to the certificate delivered, because in issuing such a certificate the treasurer would have a personal interest adverse to that of the corporation. An agent cannot act for his principal and himself when their interests are adverse, and any person dealing with an agent in a matter affecting his principal, and knowing that the interests of the agent are adverse to those of his principal, ought to be held to the duty of ascertaining that the acts of the agent are authorized by his principal. The difficulty in the present case is that these considerations are only partially applicable to it. It is on account of the danger that one officer may abuse his power to issue stock certificates that the by-laws of corporations usually require the certificates to be issued by at least two officers of the corporation. If one of these neglects his duty, or delegates the performance of it to the other, the safeguard intended by this requirement of the by-laws becomes ineffectual, and if one of these officers, in issuing a stock certificate, has a personal interest adverse to that of the corporation, a person dealing with him and knowing this may well be required to take notice that the rights of the corporation are not protected in the transaction to the full extent intended by the by-laws. The decision of this case, we think, must depend upon the question whether it is shown that the plaintiff, in taking this certificate of stock under the circumstances set out in the agreed statement of facts, acted in good faith and with due care. We are of opinion that the facts were such that the plaintiff was reasonably put upon inquiry as to the title of Reed to the certificates of stock which he undertook to pledge, and that the plaintiff is to be affected with notice of whatever he might have found out, if he had made proper inquiry. * * * We think that it is a safe and more reasonable rule to hold that a person taking in pledge a certificate of stock, newly issued in his name by an officer of a corporation, as security for the private debt of the officer, should be required to investigate the title to that stock, if the officer is one who has the power, either alone or with others, to issue stock certificates, than to hold that such a person can rely upon a certificate so issued to him in the absence of actual notice or knowledge that it has been fraudulently issued."

In this case it did not appear that the certificate delivered to plaintiff contained the usual words as to a transfer on the books of the company and surrender of the certificate, but the court said the case was not distinguishable in principle from the Moore's case, thus assuming the real principle of the Moore's case to be the same as we have indicated.

The principle case and *Hill v. C. F. Jewett Pub. Co.*, 154 Mass. 172; 28 N. E. Rep. 142, support the same views. In both these cases, an officer authorized to certify and issue certificates, issued fraudulent certificates to himself, which he indorsed and pledged with the plaintiffs as collateral security for money borrowed. When the plaintiff receives the certificates directly from the agent, in a transaction with the agent individually, it would not seem to make any material difference whether the certificates are issued in the name

of the agent or in the name of the plaintiff. The general principal to be extracted from these cases is stated in *Knox v. Eden Musee American Co.*, 25 N. Y. S. 164, 173, as follows: "That a person dealing with an officer of a corporation, who is empowered to act in the issue of stock, cannot trust to the representations either made in the stock certificate or outside of it, by such agent or officer, when acting in his own business and for his own benefit, because as to the former the party taking the certificate has reasonable notice that the power of the officer may have been abused, and as to the latter representations, though made by an officer of the corporation, they are made not by him officially, but individually." And this is in accordance with the more general rule that "persons dealing with one whom they know to be an agent, and to be exercising his authority for his own benefit, acquire no rights against the principal by the transaction." *Dowden v. Cryder* (Court of Errors and Appeals, N. J.), 26 Atl. Rep. 941, citing, *Stainer v. Tysen*, 3 Hill, 297; *Mecutchen v. Kennady*, 27 N. J. L. 230; *Safe Deposit Co. v. Abbott*, 44 N. J. L. 257; *Bank v. Underhill*, 102 N. Y. 336. See, also, cases cited in the last section.

The cases of *Titus v. Turnpike Road*, 61 N. Y. 237, and *Willis v. Fry*, 13 Phila. 33, are apparently opposed to the foregoing authorities. In the former of these cases the certificates were issued by the treasurer of defendant to himself, and pledged by him directly to the plaintiff as security for his personal loan. The defendant was held liable on the certificates, and the court says: "It is not questioned by the defendant that it is liable to the plaintiff for the acts of its officers in issuing the certificates for spurious stock, as established in the present case, *if they were authorized to issue certificates for valid stock held by themselves.*" That is, the court makes the only question in the case to be whether the president and treasurer could issue certificates for valid stock to themselves. As they were required by law to be stockholders and no provision was made for the issuing of certificates of stock, except by these same officers, the conclusion seemed inevitable that they were authorized to issue to themselves certificates for stock which they actually owned or were entitled to. The court does not consider the further question whether one taking directly from the officer a certificate so issued, was not bound to inquire whether the conditions actually existed which authorized it to be issued, and, as this question is not passed upon, the case cannot be regarded as an adjudication that such inquiry need not be made. Substantially the same thing may be said of *Willis v. Fry*, 13 Phila. 33. In this case there were a number of plaintiffs, and the fraudulent certificates issued were divisible into a number of classes. Some of the certificates were issued and disposed of by the certifying officers, directly to the plaintiffs. Of these, some were issued in the name of the plaintiffs and some in the name of the officer and assigned to plaintiffs. Some were sold and some were pledged. In sustaining the plaintiff's right to recover, the court impliedly held that they were not put upon inquiry by the circumstances of the case, but yet the question is not discussed.

In *Citizens' National Bank v. Cincinnati, etc., R. Co.*, 29 Weekly L. B. 15, the finding of fact is "that the said George F. Doughty made and executed his promissory notes and sold the notes through a banker with the certificates properly endorsed by the said George F. Doughty for transfer, that the said

defendants bought said notes relying wholly upon the representations in said certificates contained, and made no inquiry in respect to the validity of said certificates or the issue thereof of any officer of the company." Doughty was the certifying officer who had fraudulently issued the certificates in his own name. The case does not show whether the defendants knew that the banker was disposing of the notes and stock, as the agent of Doughty, or whether they supposed that the banker had loaned the money to Doughty and was selling the notes on his own account. In either case it was very manifest that Doughty had issued and used the stock in a transaction for his own individual benefit.

The subject is one which requires further elucidation before the law applicable can be stated with confidence. Reasoning from the undisputed rules in regard to principal and agent, the conclusion is readily reached that when a certifying officer sells or pledges, on his own individual account, stock which he claims to own, and produces a certificate purporting to have been certified and issued by himself, the party advancing the money is bound to inquire whether the facts existed which made the issue of the particular certificate lawful and valid. If he fails to make the inquiry he takes the risk of what inquiry would have revealed. In such case there would seem to be no logical ground for a distinction between certificates issued in the name of the officer and endorsed by him and certificates issued in the name of the person advancing the money. As to those taking the certificates from the first or any subsequent holder the case would be different. Certificates issued in the name of the first holder would bear on their face no evidence that they had been issued and used by the certifying officer for his personal benefit. Unless a subsequent holder, therefore, had notice, *aliunde*, of these facts, he would clearly be a *bona fide* holder. But as respects certificates issued in the name of the certifying officer and endorsed and delivered by him to the first holder, the evidence of the officer using his authority in his own behalf is ineffaceably impressed upon the face of the certificates, and this would seem to put every subsequent holder in the same position as the first holder who received them from the officer. It cannot be presumed that such officer issued the certificates to himself for any other purpose than to certify that he owned so much stock in his own right. Nor can it be presumed that he disposed of the certificates except for consideration moving to himself individually. The certificate is thus a continuing evidence of those facts, and they speak as plainly to a subsequent holder as to the one first in order.

WYNN v. CITY & SUBURBAN RY. CO. OF SAVANNAH.

(Supreme Court of Georgia, March 20, 1893.)

1. STREET RAILROADS. INJURY TO INFANT TRESPASSER ON CAR. EVIDENCE. The conductor of a street car may testify as to his recollection of the number of passengers upon his car at a given time and place, notwithstanding he kept a slip "taken from the register on the car, and left at the company's office, which showed the number of passengers carried on that trip."

2. EFFECT OF DRIVER'S KNOWLEDGE OF INFANT'S PRESENCE TO CONSTITUTE HIM A PASSENGER. Where a boy eleven years of age, without the intention of paying fare, but with the purpose of stealing a ride, boards a passing street car, and secretes himself from observation so as to avoid detection, he is, in law, a mere trespasser, unless his presence on the car be actually known, and assented to, either directly or by implication, by the driver or conductor. Assent to the boy's riding upon the car free will not arise by implication from the mere fact that the driver discovered him, knew of his presence, and made no demand upon him for fare; the driver being charged simply with the duty of properly managing his team, and neither required nor authorized to collect the fares, or attend to the wants of passengers—a conductor having been provided by the street railway company for these purposes.

3. DUTY OF COMPANY WITH RESPECT TO CHILDREN TRESPASSING ON CARS. While the degree of care which a street railway company owes to a trespasser upon its cars is not more than ordinary or reasonable diligence, yet, where such trespasser is a child of tender years, due regard should be paid to the known indiscretion of childhood, and the inability of children to exercise proper precautions for their own safety. The duty resting upon the company to employ the proper precautions to avoid injury to children entering its cars would comprehend the exercise of reasonable diligence to guard and shield from danger a child not of the age of discretion to understand and appreciate the peril of riding in an unsafe and exposed position. Accordingly, it would generally be negligence to allow such a child to ride upon the steps of the front platform, when his presence in a situation thus exposed to danger is actually known, or the circumstances are such as would make failure to note his peril palpable neglect and inattention to duty on the part of those having the control and management of the car.

4. DEGREE OF CARE TO BE EXERCISED BY A CHILD OF ELEVEN YEARS. Whether a boy of eleven years of age has sufficient capacity to understand and appreciate the danger of riding in an unsafe and hazardous position on a street car, and could, by the exercise of that degree of care and diligence to be expected of a boy of his years and experience, have avoided an injury to himself while thus exposed to peril, occasioned by the too rapid driving of the car around a curve, is a question for the determination of the jury, under proper instructions from the court.

ACTION by Robert S. Wynn, by next friend, against the City & Suburban Railway Company of Savannah, to recover for personal injuries. Judgment, on account of which plaintiff brings error.

R. R. Richards and *W. R. Leaden*, for plaintiff in error. *Geo. A. Mercer* and *Thos. S. Morgan*, for defendant in error.

LUMPKIN, J. 1. With wise regard for the rights of the people, the framers of our constitution provided that no law should ever

be passed to curtail or restrain the liberty of the press, and guaranteed that every person might publish his sentiments on all subjects; being responsible, however, for the abuse of that liberty. It is therefore proper and becoming that the courts and all others should recognize the constitutional right of newspapers to deal with all matters of public interest, and it is equally proper and becoming that newspapers should confine themselves within the limits prescribed by the constitution, and not abuse the liberty given them by that instrument by interfering in any manner with the business of the courts. A newspaper may at any time, with perfect propriety, fairly and truly report all proceedings which have already taken place in the courts of the country; but no newspaper has a right, while a case is under investigation, to comment upon its merits, or to express in its columns, any opinion as to questions of fact involved; and this is especially true when what is published will most probably fall under the eye of jurors actually engaged in trying the case, and who may be more or less affected or influenced by the publication. Under our system the judges have nothing to do with deciding disputed issues of fact, but these are matters left entirely to the juries. It follows that if a judge should read newspaper articles about a pending case it could have no effect upon the verdict to be rendered, for he has nothing to do with the making of the verdict, so far as the facts are concerned. It is quite different, however, with jurors; for if they should derive any impression of a case from newspaper publications, or through other sources of information outside of the evidence, it is impossible to know what effect may thus be had upon their finding. Hence it is that no attorney, party, officer of court, or any other person, is allowed to communicate with a juror about a pending case while he is charged with the consideration and determination of it. Newspapers have no more right to interfere in matters of this sort than any other person, and it is of the utmost importance that they should refrain from so doing. Whenever a newspaper, whether willfully or otherwise, violates this plain and manifest rule of propriety, and the fact comes to the knowledge of the presiding judge, it is not only his right, but his duty, to call the attention of the jury thereto, express his unqualified disapprobation of such conduct, and caution the jury not to be influenced by the publication in

question. Nor is there any error in informing the jury of his intention to summarily deal with the persons who have thus placed themselves in contempt of the court.

2. During the trial, the plaintiff, a child, was on the stand, testifying as a witness, his mother being present. The presiding judge, for reasons which were apparently well founded, thought he discovered the mother endeavoring, by nods or other motions of her head, to direct or influence the child's testimony, and called the attention of counsel to the matter, without, however, expressing any opinion as to the mother's purpose or motive. Afterwards, upon being informed that she was suffering from a nervous affection, which would account for these motions, he stated to the jury that no wrong inference should be drawn therefrom. We are unable to perceive any error in what the court did as to the matter in question. If it was plain and manifest that any person was prompting, or in any other manner endeavoring to interfere with, a witness on the stand, with a view to giving shape or direction to his testimony, it would be the duty of the presiding judge, not only to call the attention of counsel to the same, but to peremptorily put a stop to such reprehensible conduct; and where there is apparently good reason to suspect that such a thing is taking place it is certainly not improper for the court to take the proper steps to ascertain the truth, especially when this is done in such a manner as not to prejudice the rights of either party to the case.

3. Nothing can be more grossly improper and unbecoming than for a juror who has been allowed to separate from his fellows to converse with a witness about the facts of the case. There is no excuse whatever for any such conduct on the part of the juror or the witness. The misbehavior of the juror is worse than that of the witness, especially when the latter is a mere youth, as in the present case. Such misconduct, in a case at all doubtful, would require the granting of a new trial at the instance of the losing party, if he made it appear that he and his counsel were ignorant of the facts until after the trial had ended. Not only was there a failure to make this appear in the case with which we are now dealing, however, but there is very strong reason for the inference that the plaintiff and his counsel knew of the irregularity mentioned before the verdict they seek to set aside was rendered.

Whether this be true or not, before the plaintiff would be entitled to a new trial on this ground, it would be incumbent upon him to show affirmatively that he did not, with knowledge of the irregularity, take the chances of obtaining a verdict in his favor.

4. The slip taken from the register on a street car, showing the number of passengers carried on a given trip, and which the conductor was required to leave at the company's office, is not the best evidence, nor, indeed, any evidence at all, of the number of passengers on his car at any particular time or place. Consequently, there was no error in allowing the conductor to state, without producing his slip, his recollection of the number of passengers he had when the injury to the plaintiff occurred.

5. The railway company relied mainly upon the defense that the plaintiff was not, as he claimed, a passenger, but was a mere trespasser, who had gotten upon the car with no intention of paying fare, but with the purpose of stealing a ride. Much evidence was introduced in support of this contention. Mr. Shuman, one of the conductors of the company, positively identified the plaintiff as a boy who had constantly been in the habit of jumping upon his car, giving him serious trouble and vexation. If the conductor was on the rear platform, this boy would get on in front; and, when driven off the front steps, he would immediately again jump on in the rear, and would sometimes throw rocks at the car, and dirt at the conductor. Introduced as a witness in rebuttal, the plaintiff flatly denied ever having thrown dirt at Mr. Shuman, or anything at his car, or that Mr. Shuman had ever begged him not to jump on the car. Yet upon his cross-examination the plaintiff admitted that he had previously been in the habit of jumping upon the company's cars; that he knew Mr. Shuman, and had jumped on his car without his permission, and without paying fare. It was therefore incumbent upon the court to present the issue thus made to the jury. This he did with perfect fairness to the plaintiff, expressly instructing them that if the plaintiff, as he claimed, got upon the car with the expectation of paying fare, and had not paid it simply because it had not been demanded of him, then his status and rights as a passenger would be exactly the same as though payment had actually been made, the plaintiff being under no

obligation to seek the conductor, and tender him fare. On the other hand the court correctly instructed the jury that should they believe the plaintiff boarded the car with no intention of paying fare, and endeavored to secrete himself from observation so as to avoid detection, he would be a mere trespasser, unless his presence was actually known to the company's servants, and assented to by them, either directly or by implication. The authorities are numerous to this effect, and we fail to detect any error in this statement of the law. We think, furthermore, it was entirely proper to add that the jury would not be authorized to infer any implied assent to the plaintiff's remaining upon the car from the mere fact that the driver may have known of his presence. The reasons given by the trial judge in this direction are convincing. Evidence had been introduced to the effect that the driver was charged merely with the duty of managing his team, and was neither required nor authorized to collect fare, or look after passengers, a conductor having been provided by the company, whose express duty it was to attend to such matters. This being so, it is manifest the driver would have no means of knowing whether a particular person who boarded the car really did or did not expect to pay fare when demand was made upon him for the same, and for the driver to make inquiry in this regard would be an entirely unauthorized assumption of duty. Certainly, under such circumstances, it could not be seriously contended that assent to the plaintiff's riding upon the car free of charge would arise by implication merely because the driver may have known of this boy's presence, made no demand upon him for fare, nor took any measures to ascertain whether he intended to pay fare when demanded by the conductor or not. See *Muehlhausen v. Railroad Co.* (Mo. Sup.), 2 S. W. Rep. 315, in which it was ruled that such knowledge by a driver would not be sufficient to give a trespasser the rights of a passenger, when unaccompanied by any consent to remain. Indeed, whatever may be the duty of the company to a trespasser, we do not think he can consistently claim the superior protection to which a passenger is entitled, in the entire absence of anything from which it may reasonably be inferred that the company's servants not only knew of his presence, but really con-

sented to his remaining on the car, and riding free. In the present case there was nothing from which the jury could possibly imply such assent, express or otherwise, on the part of either the driver or conductor. Nor did the plaintiff rest his case upon this ground. On the contrary, he maintained throughout the whole trial that he was in no sense a trespasser, but boarded the car as a passenger upon the invitation of an elder companion, who offered to pay his fare, and was ready and willing to do so upon demand made by the conductor. The jury found against him upon this issue, and we are not prepared to say that their finding was not in perfect accord with the truth.

6. While the degree of care which a street railway company owes to a trespasser upon its cars can never be more than ordinary and reasonable diligence, yet, where such trespasser is a child of tender years, due regard should be paid to the known indiscretion of childhood, and the inability of children ordinarily to properly provide for their own safety. It is the duty of the company to employ proper precautions to avoid injury to children entering its cars, and this duty would comprehend the exercise of reasonable diligence to guard and shield from danger a child not of the age of discretion to understand and appreciate the peril of riding in an unsafe and exposed condition. Booth St. Ry. Law, § 351. Accordingly, in the absence of peculiar facts and circumstances which would excuse failure to exercise such precautions, it would be negligence to allow such a child to ride upon the steps of the front platform when his presence in a situation thus exposed to danger is actually known. And, indeed, to be entirely accurate, mere ignorance of the child's exposed position would not, in every instance, relieve the company from liability; for we can easily conceive of a case where failure to note the child's peril would in itself be gross and palpable neglect and inattention to duty on the part of those having the control and management of the car. It is proper to add, however, that the rule herein announced should be construed in its fair and legitimate sense, and applied wisely and justly. It cannot be required of a driver or conductor that he shall maintain a constant and unrelenting watch over the movements of a child upon his car, and devote to such child his entire attention, to the exclusion of other and equally pressing and important duties devolving upon him. Id. § 351; Sandford

v. Railroad Co., 136 Pa. St. 84; 20 Atl. Rep. 799. All that can or should be expected of the company's servants is that they shall exercise that degree of diligence which would be observed by a reasonably prudent and cautious man under similar circumstances. Sandford v. Railroad Co., 136 Pa. St. 92; 20 Atl. Rep. 799. In all cases wherein it has appeared that neglect of duty in this respect was unquestionably palpable and inexcusable the railroad company has been held liable. Railroad Co. v. Moore, 83 Ga. 453; 10 S. E. Rep. 730; Railway Co. v. Caldwell, 74 Pa. St. 421; Brennan v. Railroad Co., 45 Conn. 284; Wilton v. Railroad Co., 107 Mass. 108; Railway Co. v. Bohn, 27 Mich. 503. The opinion in the case last cited was delivered by Justice Cooley, the now eminent text-book writer, and is an able and comprehensive exposition of the law upon the subject with which we are now dealing. But care has been taken that this rule should not operate harshly or oppressively, and where the company has introduced proof of special facts and circumstances explaining and justifying the omission of its servants to warn and compel a heedless little one to occupy a place secure from danger, the courts have uniformly afforded to the company ample protection against unjust and unauthorized verdicts. Railroad Co. v. Kelly (Pa. Sup.), 11 Amer. & Eng. R. Cas. 123; Clutzbeher v. Railway Co. (Pa. Sup.), 1 Atl. Rep. 597; Butler v. Railway Co., 139 Pa. St. 195; 21 Atl. Rep. 500; Wrasse v. Traction Co. (Pa. Sup.), 23 Atl. Rep. 345.

In the present case the negligence of the company, upon which the plaintiff seems to have entirely relied for a recovery, was the alleged too rapid driving of the car around a curve. It was not shown upon the trial that either the driver or conductor had any actual knowledge of this boy's presence, or by the exercise of proper diligence could have been so informed. The only evidence from which knowledge on the part of either could possibly be inferred was the testimony of the witness Dudley, the boy who accompanied the plaintiff. He says: "I seen the driver. I could not see him very well, he was so small. There was nothing there to prevent his seeing us. We were standing right there, and he was right there." The boys were on the opposite side of the platform from that occupied by the driver. Both say the platform was crowded, a number of men standing between them

and the driver. Dudley estimates the number at nine; the plaintiff at a dozen and a half. They also agree as to the circumstances under which they boarded the car. They were returning home, late at night, when the street car came along. They had already passed York street, and boarded the car as it was running slowly between that and the next cross street, without any notice to either the driver or conductor. This plaintiff says: "I did not call the conductor to stop the car, or make any effort to. Tried to get on the rear platform, but there was such a crowd, couldn't." Being unable to get on in the rear, the boys ran along the side of the car, and jumped on the front platform, and had ridden but a short distance when they were thrown off by a jerk of the car in going around a curve. This is the sum and substance of the evidence introduced by the plaintiff bearing upon this question. It was not claimed that the conductor saw the boys get on, or afterwards discovered them, or had any reason to suspect their presence. Had they stood on the street corner ready to board the car, and at once jumped on the front platform as the car passed, the inference might possibly have arisen that the driver saw them; but, under the circumstances recited by the plaintiff, there was nothing which would naturally attract the driver's attention to the fact that they desired to become passengers, or had in fact boarded the car. Nor is the plaintiff's case aided by any facts elicited by the examination of the defendant's witnesses. On the contrary, both the driver and the conductor emphatically deny any knowledge of the plaintiff's presence prior to the accident, and in almost every material particular the testimony given by the plaintiff and his companions is flatly contradicted. According to the theory of the conductor, they must have gotten on the car immediately after it left a switch where he stopped to receive "transfers" from another car, some considerable distance below York street, and only 147 feet from the place of the accident. He had, but a short time before reaching the switch, just finished collecting fares, and there were then on the front platform only three passengers—two men and a colored boy—the last of whom he compelled to go inside. As he got off his car at the switch, the conductor saw two boys run around the end of another car standing there; but although, as he asserts, he endeavored to ascertain whether they had boarded

his car as it started again, he failed to discover them. He gave his immediate attention to collecting the transfer tickets of those who had gotten on the rear platform, and had just started to go through the car to the front platform, when, as he presumes, the boys must have seen him coming, and jumped off to avoid the payment of fare. As to the number of men on the front platform, the driver agrees with the conductor, and says he certainly would have noticed the boys, had they stood upon the platform, as they assert, and can account for his failure to discover them only upon the assumption that they must have secreted themselves from his view by swinging back along the side of the car. This both he and other witnesses explained could be done by placing one foot on the lower step, catching hold of the "grab rail" on the side of the car, and leaning backward. If another witness offered by the defendant is to be credited, the correctness of this supposition on the part of the driver is established. The conductor of a car which was following immediately in the rear of the one in question testified positively to having seen a boy in the position indicated just after the cars had left the switch, and but a moment before the accident. He says: "I was on the front platform of my car,—on the left-hand side. I could see the West Broad street car plainly. I looked at the car, and saw a little boy swinging hold to the railing on the side, leaning back, that way, with his foot on the steps, and he jumped off, and as the car turned (the curve) I heard he was hurt." On the cross-examination of this witness he reiterated substantially, but more in detail, what is above quoted. Numerous other witnesses were introduced; but in the great mass of testimony adduced at the trial, there is not a single circumstance which would indicate that there was any negligence whatever on the part of either the driver or conductor in failing to discover the plaintiff's peril, and taking proper precautions to avert the grievous disaster which ensued.

In presenting to the jury the issues to be determined the trial judge evidently overlooked this aspect of the case, as constituting a separate and distinct ground of liability. While he instructed the jury, in general terms, to "see whether or not the company exercised that amount of diligence which this child had the right to expect from this company," he did not specifically call their attention to the fact that in the case of a child of tender years the ex-

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ercise of ordinary and reasonable care would comprehend greater diligence than that to which an adult would be entitled, nor did he expressly direct them to consider whether, under the facts and circumstances in evidence, it was negligence on the part of the company to allow a child of the plaintiff's age to ride in an exposed position on the front platform of the car. But, as before stated — if, indeed, this ground of liability was not entirely ignored by counsel for the plaintiff, — it is clear, for aught that appears in the record, it was not relied on, or insisted upon, as a basis for recovery. Be this as it may, it is manifest the plaintiff could not have recovered upon this branch of his case, when the facts above recited are given their proper significance. Nor do we think this issue was presented with sufficient clearness to demand that the court, on his own motion, and without request, should specially charge thereon. Certainly, under the circumstances, failure to do so would not authorize the granting of a new trial. The plaintiff rested his entire case upon the ground that he was a *bona fide* passenger on the company's car, and as such could recover for even slight negligence on the part of the company's servants in driving too rapidly around the curve. This contention the court presented to the jury more favorably to him than he had any right to demand or expect. Granting the plaintiff was a passenger, he would have no right to recover because of a slight jerk from which he would have suffered no harm had he been occupying a position inside the car, unless there was concurring negligence in allowing him to remain in an unsafe position on the platform. Ordinarily a street-railway company is bound to run its cars with such caution only as will insure the safety of those occupying positions provided for passengers, and pointed out to them as safe; and, to render the company liable to one injured while standing on the platform, circumstances must be shown from which may be implied an undertaking on the part of the company, despite the increased risk, still to carry such passenger with safety. Booth, St. Ry. Law, § 339. The court charged the jury, in effect, that should they believe the plaintiff, while a passenger, and without fault on his part, was thrown off the platform by a jerk of the car, even though the negligence of the company in driving at an unusual speed was slight, he would be entitled to recover. This instruction, we think, was more favorable

to the plaintiff than the evidence warranted. According to his own testimony, the plaintiff, at a late hour in the night, boarded the car between two street crossings, while the car was in motion, and without giving notice of his intention to do so. There is no evidence to show that the company's servants knew he had boarded the car, but there is much evidence to establish the fact that his presence on the car, in a situation of peril, was entirely unknown to them, and if this be true they certainly could not have assented thereto.

7. It was urged by the railway company that the plaintiff was himself grossly negligent in voluntarily riding in an open and exposed position on the front platform, a situation which the company contended was obviously hazardous and unsafe. Under the system of practice which obtains in this state, it cannot, as a matter of law, be said that a child between the ages of 10 and 14 years would or would not, under such circumstances, be chargeable with contributory negligence. To those only who have arrived at years of discretion does the law impute negligence. The plaintiff was at the time of the injury 11 years of age. Therefore, whether or not he had sufficient capacity to understand and appreciate the peril of thus exposing himself to danger was a question, not of law, but of fact, to be determined by the jury, under proper instructions from the court. *Railroad Co. v. Young*, 81 Ga. 397; 7 S. E. Rep. 912; *Rhodes v. Banking Co.*, 84 Ga. 320; 10 S. E. Rep. 922; *Wynne v. Conklin*, 86 Ga. 40; 12 S. E. Rep. 183. And see *Saare v. Union Railway*, 20 Mo. App. 211; *Railway Co. v. Bohn*, 27 Mich. 503; *Railway Co. v. Hassard*, 75 Pa. St. 367; *Booth, St. Ry. Law*, § 385, citing numerous cases. The charge of the court upon this branch of the case was not only free from error, but was unusually clear and comprehensive, and entirely fair and impartial. It is the peculiar province of the jury to settle questions of this nature; and although, in the present case, they may have believed the company guilty of slight negligence, yet, as they also doubtless believed the boy could, by exercising that degree of ordinary care of which he was capable, have avoided being injured, we do not feel authorized to disturb their verdict. *Branham v. Railroad*, 78 Ga. 35; 1 S. E. Rep. 274.

8. The motion for a new trial in this case contained many grounds, the most material of which have already been specially

considered. The remaining grounds are indicated in the last headnote, and need not be discussed separately or in detail. None of them are such as will require a new trial. Many of them involved questions of but trivial importance, and which have often heretofore been passed upon by this court. After a careful and laborious examination and study of the entire record, we are satisfied the verdict could not properly have been otherwise. Indeed, it is quite improbable that a jury would make a wrong finding in favor of a corporation against a child of tender years, who has been so sadly maimed for life. There are, perhaps, some slight verbal inaccuracies in the charge of the court, and it might, as indicated in a preceding division of this opinion, have been in some respects more full and complete. It is proper to remark, however, that the court was not requested to instruct the jury more in detail; and as to such inaccuracies as we have incidentally discovered, and to which reference is here made, none of the same are specially pointed out, or assigned as erroneous. The assignment of error upon the charges excepted to is general, merely, involving only objection to the principles therein announced, and the questions thus made we have separately considered and disposed of. As a whole, the charge of the court fairly and impartially submitted to the jury the merits of the case on trial, and no good reason is shown for protracting this litigation, which has already ended in a manner entirely consistent with the real justice of the matter in controversy.

Judgment affirmed.*

Street railroads — injury to boy attempting to board front platform.—Where a boy attempts to get on the front platform of a horse car, which has stopped to let off a passenger, without giving any indication to either the driver or conductor of his intention to become a passenger, and is not seen by either of them, the street railway company is not liable for injuries to such boy, caused by starting the car, in the ordinary manner, just at the time of making such attempt. *Pitcher v. People's Street R. Co.*, 154 Penn. St. 560; 26 Atl. Rep. 559.

* Reported in 17 S. E. Rep. 649.

CITY OF CHARLESTON v. WERNER.

(Supreme Court of South Carolina, March 21, 1893.)

1. **MUNICIPAL CORPORATIONS. FILLING UP LOW LOTS TO ABATE A NUISANCE. POLICE POWER.** The filling up, by the city of Charleston, of a low lot which has been declared a public nuisance by the board of health, and ordered to be filled, is not a "local improvement," within the meaning of the tax laws applicable to that subject, but is an exercise of the police power granted to the city council.

2. Act 1830, amending the charter of the city of Charleston, authorizing the city to fill up low lots declared to be nuisances by the board of health, and to recover the cost from the landowner if it does not exceed one half the value of the lot, is a valid exercise of the police power, and the general assembly has the right to delegate such power to the city authorities.

3. **AMENDMENT OF A CITY CHARTER DOES NOT AFFECT EXISTING ORDINANCES NOT INCONSISTENT THEREWITH.** In an action by the city to recover the cost of filling up such a lot, which cost admittedly did not exceed one-half the value of the lot, the court cannot declare *ultra vires* Rev. Ordinance, §§ 227, 228 passed originally in 1859 in exact conformity to the act of 1830, merely because the general assembly, in 1883, again amended the charter, and authorized the condemnation of such lots by the city council in case the cost of filling them up should exceed one-half their value.

A PPEAL from common pleas circuit court of Charleston county; J. B. Kershaw, judge.

Action by the city council of city of Charleston against Doris Werner for filling up a low lot in the city owned by defendant. Defendant's oral demurrer to the complaint was overruled, and she appeals.

The complaint reads as follows: "The said city council of Charleston, plaintiff, complaining of the said Mrs. Doris Werner, the defendant alleges: (1) That it, the said plaintiff, is a municipal corporation, under the laws of the said state of South Carolina. (2) That by sections 227 and 228 of the Revised Ordinances of the city of Charleston, ratified in city council on the 26th day of September, 1882, it is ordained and enacted as follows, that is to say: 'Sec. 227. Whenever it shall appear to the board of health that any low lots or vacant grounds are in a condition to injure or endanger the public health, it shall be the duty of the said

board of health to appoint a board of inspectors, to be composed of the city registrar and four members of the board of health (any three of whom shall be a quorum), whose duty it shall be to enter upon and thoroughly examine such lots or vacant grounds, and determine by the vote of not less than three of the said board whether such lots or vacant grounds shall be drained, filled up, leveled or otherwise so improved as to remove the nuisance and evil there complained of or existing; and, should the said board of inspection be of opinion that such lots or vacant grounds ought to be filled up, leveled or drained, they shall submit a detailed report to the city council, setting forth the actual condition thereof, and suggesting the mode, materials and extent to which such low lots or vacant grounds shall be filled up, leveled, or drained; upon which report council shall take such order and direction thereon as they may deem expedient. Sec. 228. In case council shall order the report of said board of inspection, made as aforesaid, to be carried into effect, or shall direct such low lots to be filled up, leveled, or drained, it shall be the duty of the city registrar to serve a notice, in writing, on the owner or owners of such low lots or vacant grounds, directing said owner or owners to have such lots or vacant grounds filled up, leveled, or drained, as council may require, to such extent, in such manner, with such materials, and within such reasonable time as may be prescribed by the said order of the city council; and, in case of neglect or refusal of such owner or owners to obey said notice, it shall be the duty of the city registrar to cause such lots or grounds to be filled up, leveled, or drained in the manner prescribed in said notice, under the order and direction of the said board of inspection. The expenses and charges paid and incurred in case such lots or grounds shall be filled up, leveled, or drained, under the order of the board of inspection, shall be paid, in the first instance, out of the city treasury, and shall afterwards be recovered, with interest and costs of suit, in an action of debt, to be brought by council, in the court of common pleas, against the owner or owners of such lots or grounds. The city engineer shall, whenever required, attend the said board of inspection on the examination of low lots and grounds, and, under their direction, make plans for filling, leveling, and draining the same.' (3). That the defendant is the owner in fee simple of all that lot, place, or parcel of land, with

the buildings thereon, statute, lying, and being on the west side of South street, in the city of Charleston, now or formerly known as 'No. 4' on said street; measuring and containing ninety-three feet in front on South street, by two hundred feet in depth, be the same more or less; abutting and bounding north on land of Dr. John C. Faber, east on Smith street aforesaid, south on land of W. J. Parker, and west on land formerly of Thomas Bennett. (4) That the rear portion of the said lot of the said defendant was a low lot extending out into what was formerly a part of Bennett's mill pond, and in a condition to injure and endanger the public health. (5) That the board of health of the said city of Charleston, as required by the ordinances hereinbefore recited, appointed a board of inspection, composed of the city registrar and four members of the board of health, to enter upon and thoroughly examine said lot, and determine whether the same should be drained, filled up, leveled, or otherwise so improved as to remove the nuisance and evil there existing; that the said board of inspection inspected the said premises, determined that the said lot should be filled up to a proper level above the street, and, pursuant to such determination, the said board submitted a detailed report thereof to the city council, setting forth the actual condition thereof, and suggesting the mode, materials and extent to which the said lot should be filled up; that thereupon the said city council, by a resolution passed at a meeting held January, 1888, ordered and directed that the findings of the said board of inspection be carried into effect. (6) That thereupon the city registrar, on the 28th day of January, 1888, did serve a notice, in writing, as required by the ordinance aforesaid, on the said defendant, the owner of the said low lot of land, requiring her to fill the said lot with sand, gravel, clay, or shell, to a level even with the grade pegs placed by the city engineer, within sixty days from the date of said notice, and notifying her (the said defendant) that, if the said filling was not done within the time specified, the same would be done by the city council at her expense. (7) That the said sixty days having expired, the city registrar did cause the said lot to be filled up in the manner prescribed in the said notice, under the order and direction of the said board of inspection, depositing upon the said lot fifteen hundred and three (1,503) cubic yards of earth, at an expense of eleven

hundred and fifty-seven and 10-100 (\$1,157.10) dollars, which hath been paid out of the city treasury, and that no part thereof has been paid by the said defendant. And the plaintiff alleges that the said sum of \$1,157.10 does not exceed one-half of the value of defendant's lot of land. Wherefore plaintiff demands judgment against the said defendant for the said sum of eleven hundred and fifty-seven and 10-100 (\$1,157.10) dollars, with interest and costs."

Mordecai & Gadsden, for appellant. *Charles Inglesby*, for respondent.

MCGOWAN, J. This is an action by the city council of Charleston to recover from the defendant, Doris Werner, the amount paid by the city council for filling up a low lot in the city, the property of the said defendant, which said lot, or a portion thereof, had been inspected by the "Board of Health," determined to be a nuisance, dangerous to the public health, and ordered to be filled. The defendant having been notified, as required by law, to fill the said lot, and having failed so to do, the same was filled by the city authorities, and the present action is for the recovery of the cost of the said filling, viz., for 1,503 cubic yards of earth, at an expense of \$1,157.10, which has been paid out of the city treasury. The plaintiff alleges that no part thereof has been paid by the said defendant, and that the said sum does not exceed "one-half the value of defendant's said lot of land;" whereupon plaintiff demands judgment against the said defendant for the sum of \$1,157.10, with interest and costs. was the promotion of the general public health. When the complaint was read, the defendant, by her counsel, interposed a verbal demurrer, and moved to dismiss the complaint, for the reason that it did not state facts sufficient to constitute a cause of action. His honor, Judge Hershaw, overruled the demurrer, and the defendant appeals to this court, upon the following exceptions, (the complaint in full should appear in the case :) "First. Because sections 227 and 228 of the revised ordinances of the city of Charleston (September 26, 1882) are in violation of the fifth amendment to the constitution of the United States, as well as section 23, art. 1, of the constitution of South Carolina, because said sections authorize a personal judgment against the defendant

as the alleged owner of the lot described in the complaint, etc. Second. Because the act of the general assembly of the state of South Carolina 'to authorize the city council of Charleston to fill up low lots and grounds in the city of Charleston in certain cases, and for other purposes,' etc., (December 18, 1830,) as well as the act to amend the same, (December 19, 1883,) and each and both, are in violation of, and in contravention to, the fifth amendment to the constitution of the United States, and section 23 of article 1 of the constitution of the state of South Carolina. Third. Because the oral demurrer should have been sustained, in that it appears upon the face of the complaint that the cost of the alleged improvement was not apportioned among all the property owners of the special taxing district, and that there was no system of apportionment whatever. Fourth. Because the said sections of the revised ordinances of the city of Charleston are *ultra vires* and void, in that no provision is made in said sections for condemning the land should the cost of the proposed improvement exceed one-half of the value of the land."

There seems to be some misapprehension as to the nature and object of this proceeding. Reference is made to the "alleged improvement" and "the apportionment" of the costs among all the property owners of the special taxing district. This clearly refers to the principles applicable to a local tax for the purpose of making improvements, such as paving a street or opening one; but, as we understand it, this is not a matter of taxation at all, either general or local. The object of this proceeding is not to raise money to support the city government, or to improve the value of property in a particular locality, (which may, however, be incidentally the result,) but to put in operation the police power granted to the city council for the purpose of preserving the health of the city. It is the machinery provided for enforcing the law against nuisances, which menace the health of the public. "A law which might be invalid, as an exercise of the right to tax for revenue, might be sustainable where its purpose was the promotion of the general public health or morals. In exercising the power of taxation, no discriminations are to be made, while in the exercise of police power the state is ordinarily to be governed only by considerations of what is for the public welfare." 18 Amer. & Eng. Enc. Law, p. 544,

and notes. We must not, therefore, confound an exercise of the police power with the nice distinctions which belong to the doctrine of taxation for local improvements. In 1783 the city council of Charleston was incorporated with the usual police powers. 7 St. p. 97. In 1830 the charter was amended, giving expressly the following police powers: "That whenever the city council of Charleston shall be of opinion that any lots or grounds within the city belonging to any person or persons," etc., "are in a state of nuisance, or so situated that in warm or unhealthy seasons a nuisance may thereby be created, and the health of the city endangered, or whenever the land or streets in the vicinity of said lots may become liable to injury therefrom, the city council," etc., "shall have full power and authority to cause a notice to be served on the owner of such lots or grounds directing him or them to have the same filled up to such extent, in such manner, with such materials, and within such reasonable time as may be prescribed in such notice; and, in case the owner of such lots shall neglect or refuse to fill up said lots, that the said city council are hereby authorized and empowered to have such lots filled up," etc. "(2) All expenses or charges paid or incurred by the said council in case such lots shall be filled up under their authority shall and may be recovered in an action of debt against the owner or owners of such lots or grounds; provided, the said expenses and charges do not exceed more than half the value of said lots or grounds," etc. In 1839 the city council passed an ordinance containing two sections, in conformity with the above act, which in 1882 were re-enacted in the Revised Ordinances as sections 227 and 228. In 1883 the general assembly again amended the charter by adding the following words: "Provided, however, that, if the estimated expenses and charges of filling said lots shall exceed more than one-half the value thereof, then, and in that event, the said city council shall have power and authority to condemn the said lots, and upon paying to the owner or owners the price that may be fixed therefor, as hereinafter provided, the title thereof shall vest in the said city council of Charleston," etc. It will be observed that the complaint recites sections 227 and 228 of the Revised Ordinances of the city, which are in exact conformity to the terms of the act of 1830; and, if that act is constitutional, it is difficult to see the

point made by the last ground of appeal,—that “the said sections of the Revised Ordinances are *ultra vires* and void, in that no provision is made in said sections of said ordinances for condemning the land should the cost of the proposed “improvement” exceed one-half of the value of the land,” etc. The right to condemn the land and pay for it is mentioned for the first time in the amendment of 1883, which was long after the said sections of the ordinances were passed; and that right—to condemn—was given only in the event that the charge of filling the lots “shall exceed more than one-half the value thereof.” This was not a case falling in that category, for the complaint alleged distinctly “that the said sum of \$1,157.10 does not exceed one-half the value of defendant’s lot of land,” etc. The oral demurrer, for the purposes of the issue made by it, admitted that fact; and therefore it was not necessary to make that point under the amendment of 1883, which did not cover the case, and the matter stood precisely as if that act had never been passed. As urged for the plaintiff: “In the amendment of 1883, we have no express provision for, but an unmistakable exclusion of, such a case as the present.”

Then, the only question in the case is whether the act of 1830, amending the charter of the city council of Charleston, is constitutional or not. The state, through the lawmaking body, certainly possesses the police power, which, from its very nature, has no well-defined limits, but must be as extensive as the necessities which call for its exercise. Although not clearly defined, it is an extensive power, distinguished not only from the power of taxation, but also from that of eminent domain, and, in its widest sense, is said to be the general power of a government to preserve and promote the general welfare, even at the expense of private rights. “It is difficult, if not impossible, to define the exact scope of the term. The supreme court of the United States have declined to do so, stating that they would only determine each case as it arose.” *Stone v. Mississippi*, 101, U. S. 814; 18 Amer. & Eng. Enc. Law, p. 740, and notes. The title of the act in question was: “To authorize the city council of Charleston to fill up low lots and grounds in the city of Charleston in certain cases, etc. Its whole and exclusive purpose was to promote and secure the health of the city of Charleston; and it would be difficult to conceive of a clearer case of the exercise of the police power. “Health being

the *sine qua non* of all personal enjoyment, it is not only the right, but the duty, of a state to pass such laws as may be necessary for the preservation of the health of the people. For this purpose a state may compel the clearing and drainage of lands, which might otherwise create malarial or other diseases, or provide in any other reasonable way for the preservation of the public health," etc. See Council v. Baptist Church, 4 Strob. 307; Railroad Co. v. Gibbes, 24 S. C. 61; Town Council v. Pressley, 33 S. C. 56; 11 S. E. Rep. 545; 18 Amer. & Eng. Enc. Law, p. 750, and notes. We have no doubt that the amending act of 1830 was constitutional, and that the general assembly had the right to delegate the police power to the city council of Charleston. The judgment of this court is that the judgment of the circuit court be affirmed.

McIVER, C. J., and POPE, J., concur.*

Power to abate nuisance by filling up low lands—A statute which authorized the city of Boston to purchase or take a large area of lands for the purpose of raising and draining the same in order to abate a nuisance, was held to be a valid exercise of the legislative power. Dingley v. Boston, 100 Mass. 544; Page v. O'Toole, 144 Mass. 303.

The charter of the city of Rochester empowers the common council to provide by ordinance for filling up, draining, and cleansing any damp, foul, or unwholesome yards, slips or cellars. An ordinance provides that every owner or occupant of a stone quarry shall either cause the same to be filled level with the ground, or the water therein to be drained. Held, that the owner of an abandoned quarry was liable for the penalty prescribed where he permitted a pond to stand, which became stagnant during summer, and emitted sickening odors. City of Rochester v. Simpson, 134 N. Y. 414; 31 N. E. Rep. 871.

INHABITANTS OF PARIS v. NORWAY WATER CO.

(Supreme Judicial Court of Maine, February 25, 1898.)

1. **WATER COMPANIES. WATER PIPES, HYDRANTS, ETC., ARE TAXABLE AS REAL ESTATE.** The water pipes, hydrants and conduits of a water company, laid through the streets of a city or town, are taxable as real estate to the company in possession of them, under our statute, in the city or town where they are laid.

THIS was an action of debt, brought in the name of the inhabitants of Paris, for the collection of a tax assessed by the as-

*Reported in 17 S. E. Rep. 33.

sessors of said town against the Norway Water Company, as a nonresident, on its property in the town of Paris, viz., on its aqueducts, pipes, conduits, hydrants, and franchises within said town, as real estate. The assessors of said town were duly elected and qualified at the annual meeting in March, 1890, duly called. The assessors gave notice in writing as required by Rev. St. c. 6, § 92, and said corporation did not make or present any list to said assessors. In the apportionment of taxes for state, county, and town purposes for the year 1890, said assessors assessed against said corporation the sum of \$73.50, and thereafterwards, on the 8th day of July, 1890, committed the said tax, with the other taxes assessed for that year, to the collector, who was duly elected and qualified, under a warrant in due form of law. Said collector duly and properly returned the tax so assessed against said corporation, within the time required, to the treasurer of said town, who was duly elected and qualified. The acts and duties of said treasurer in receiving and recording said tax were in due form. Demand for the payment of said tax was seasonably made before commencement of this suit. The suit was properly authorized by the selectmen. The defendant is a legally organized corporation, having its place of business at Norway, in the county of Oxford, and owning therein a pumping station, reservoir, and certain pipes and hydrants, with rights, as defined by its charter, to take water from Pennesseewassee lake, in Norway. Its pipes and hydrants extend into Paris, and through the village of South Paris, for the use of which water the said corporation is paid. Said corporation owns no property in said town of Paris, except its aqueducts, conduits, pipes and hydrants, as described in the assessment of said tax; and its pipes and hydrants in Paris are supplied from the pumping station and reservoir in Norway.

Upon the foregoing statement of facts and evidence introduced, the court were to render such judgment as the rights of the parties require, and, if for plaintiff, the amount due shall be assessed at *nisi prius*, as a petition for abatement, before the county commissioners, is now pending.

J. S. Wright, for plaintiff. *Bearce & Stearns*, for defendant.

HASKELL, J. Debt for a tax laid upon defendant's aqueducts, conduits, pipes and hydrants, as real estate, within the town of Paris. These appliances are used to distribute water among the citizens' of Paris, supplied by a pumping station and reservior in Norway. where the defendant corporation has its place of business. By charter (Acts 1885, c. 369; Acts 1887, c. 46), defendant is authorized to supply the inhabitants of Paris and Norway with water, and to lay pipes necessary for the purpose through the streets of both towns. The charter does not locate the corporation in either town.

Taxes on real estate are to be assessed "in the town where the estate lies, to the owner or person in possession thereof" (Rev. St. c. 6, § 9), and real estate, for the purposes of taxation, includes "all lands * * * and all buildings erected on or affixed to the same" (Id. § 3), and the word "lands" includes "all tenements and hereditaments connected therewith and all rights thereto and interests therein." (Id. c. 1, § 6, rule 10.)

Under these provisions, a boom across the Kennebec river, fastened to permanent piers in the river and to the shores by chains, was held to be real estate, for the purposes of taxation. *Hall v. Benton*, 69 Me. 346. So was that part within the state of a toll bridge across a river that marks the boundary line. *Kittery v. Portsmouth Bridge*, 78 Me. 93; 2 Atl. Rep. 847. Water pipes were assessed in *solido* with personal property in *Rockland v. Water Co.*, 82 Me. 188; 19 Atl. Rep. 186, and in a suit for the tax it was contended that they were real estate, and improperly included in an assessment with chattels; but the court, without deciding the question, held it immaterial, as the controversy was one of overvaluation, merely.

It will be seen from these authorities that the court gives very wide scope to the definition of "real estate," for the purpose of taxation, and it is best that it should be so. Subjects of public revenue should contribute to the public burdens so that they may lie as equally as possible among all people; and, in these days, when capital accumulates in commercial centers, many times representing contrivances, local and permanent in character, that contribute an income, it is just that such source of profit pay its tax where its location may be.

Aqueducts above or under ground are but conditions suited for

carrying water, undefiled, through or over the soil. They are fixtures, permanent in character, and part of the land that sustains them. Size, capacity, and the material used in their construction, do not change their nature. They are a constituent part of the freehold, and, so long as they remain the property of the owner of the fee, their character as real estate will not be questioned. It is only when they are constructed and occupied by persons or companies having no title in the soil that their classification as property becomes doubtful; that is, the interest of such persons or companies in them becomes of doubtful classification, rather than their generic character, regardless of ownership. The owner of a fee may, by sale of some structure upon it, and by granting license for it to remain, as between himself and the vendee, make it a chattel, while as a whole, in a generic sense, it would be classified as real estate.

The proper classification, under the rules of the common law, of this species of property, is not a new question. It has been many times considered in England during the last century; and water mains and underground conduits have there been considered as fixed to, included in, and part of, the soil. They have been considered real estate, and have uniformly been held locally taxable as such to the "occupiers of lands," under the statute of 43 Eliz., or, as our statute puts it, "to the person in possession thereof." *King v. Mayor, etc., of Bath*, 14 East, 610; *King v. Waterworks*, 1 Maule & S. 634; *King v. Gaslight & Coke Co.*, 5 Barn. & C. 466.

Under the statute of 38 Geo. III., laying taxes upon the owners of "lands and hereditaments," the pipes of a water company in a street were held to be not taxable as land to the owners of them. Lord Campbell says: "The right in question, where exercised, appears to us to be in the nature of an easement, and neither land nor hereditament. The right is to convey water through the land of another; and whether the water is to be conveyed upon the surface of the ground, or in covered drains, or in pipes, appears to us, for this purpose, to be immaterial. The mere power to lay the pipes in land cannot be considered land or hereditaments; nor do we think that the pipes, when laid, can be so considered, within the meaning of the land tax acts. * * *

The company are not the owners of the land where the pipes lie,

nor are they the tenants of the land. * * * The moment the company take up their pipes which had been laid under the streets of any particular parish, all pretense for saying that they have or held land in the parish would be gone; but, after the pipes are removed, all the land in the parish would remain, and it would be had and be held as before. * * * But 'land,' like the word 'inhabitant,' which likewise occurs in 43 Eliz. c. 2, has various meanings; and it may, in that statute, passed to throw a charge upon the occupier, mean the ground on which a chattel is deposited in the exercise of an easement, although in other acts of parliament it means a legal interest in the soil. This is the meaning which, we think, it bears in the land tax acts." *Waterworks v. Bowley*, 17 Q. B. 358.

The city of Providence laid a tax on the pipes of the gas company in the streets, as real estate, under a statute authorizing such a tax against those "who hold or occupy the same," and it was held a valid tax, like those laid under the statute of Elizabeth. *Gas Co. v. Thurber*, 2 R. I. 15.

So a pipe line laid through the soil of New Jersey, under grants from the owners of the fee, is not only real estate, when considered as a part of the fee, but is held, for the purposes of taxation, to be real estate of the company owning it, under a statute defining "real estate" as including all lands, and all buildings or erections thereon or affixed thereto. *Pipe Line Co. v. Berry*, 52 N. J. Law, 308; 19 Atl. Rep. 665.

Gas mains and pipes are sometimes distinguished from the class of property now under consideration, as apparatus for the delivery of the manufactured article, and are considered machines or chattels. *Com. v. Gaslight Co.*, 12 Allen, 75; *Memphis Gaslight Co. v. State*, 6 Cold. 310. Water pipes, etc., are not machinery. *Dudley v. Aqueduct Corp.*, 100 Mass. 183.

The public has an easement in land, over which streets and roads are laid, coextensive with the necessities of public use. No title in the soil is acquired thereby, and when the ways are discontinued the easement is extinguished. Private corporations, like gas companies, water companies and street railway companies, by legislative authority, are sometimes allowed the use of the public easement to serve the necessary demands of society, and without any additional compensation to the owner of the

soil. Such companies, therefore, by the public license accorded them, take no title in the land. They are simply allowed to use it for the public convenience as a counterbalancing consideration for their expenditures, giving opportunities to gather tolls from its use. In using the street or road, they place their pipes or rails in or upon the ground, there permanently to remain. They occupy land with appliances that become valuable for the revenue they yield. These appliances are fixed, permanent, used in connection with the soil that supports and sustains them. When considered as the property of their respective companies, they are not land, within the common law rule. But, when considered as if owned by the same person who has title to the soil, they may properly enough be so considered. Suppose the street, with these appliances in it, be discontinued, and they be abandoned, without removal, and pass to the owner of the soil, who should then lease them, in gross or singly, to tenants or persons desiring to operate them. Would they not be real estate, when considered with the property as a whole? Would they not pass by a deed of the land? Why then, may they not properly enough be assessed as real estate, and to the person in possession of them? Their value as chattels would be nominal. Water pipes buried in the ground as chattels would be of little or no value. It is the use that gives them value, and that use is strictly of a fixture,—a permanent appliance. As bearing upon this view, see *Water Co. v. Lynn*, 147 Mass. 31; 16 N. E. Rep. 742; *City of Fall River v. Bristol*, 125 Mass. 567; *People v. Cassity*, 46 N. Y. 46.

In the last case cited, in considering the validity of a tax upon a street railway as land, under a statute very similar to ours, *Folger, J.*, said: "The statute means, for its purpose, to make two general divisions of property,—one, all lands; another, all personal estates,—and then, to be more definite, it declares that by 'land' is meant the earth itself, and also all buildings and all other articles erected upon or affixed to the same. We do not think that, when buildings or other articles are erected upon or affixed to the earth, they are not, in the view of the statute, land, unless held and owned in connection with the ownership of a fee in the soil. We are of the opinion that the statute means such an interest in real estate as will protect the erection or affixing

thereon, and the possession, of buildings and fixtures, which will bring those buildings and fixtures within the term 'land,' and hold them to assessment as the lands of whomsoever has that interest in the real estate, and owns and possesses the buildings and fixtures. The defendants are right, then, in considering the track of the relators as land, and liable to assessment as such."

In our opinion, water mains, pipes, etc., may be considered real estate, and taxable, where they are located, to the person or company owning them. The idea that they may be considered appurtenances to the place of supply and taxable there is untenable. There is no principle upon which it can rest. *King v. Bath*, supra, and *King v. Gaslight & Coke Co.*, 5 Barn. & C. 466. See *Manufacturing Co. v. Newton*, 22 Pick. 22. The Iowa doctrine, that waterworks are real estate, and taxable as an entirety at the place of supply, is not supported by authority. *Oskaloosa Water Co. v. Board of Equalization (Iowa)*, 51 N. W. Rep., 18.

Defendant defaulted.*

PETERS, C. J., and WALTON, LIBBEY and FOSTER, JJ., concurred.

Whether water and gas pipes and electric wires are to be considered as real estate or personal property for purposes of taxation.—*Shelbyville Water Co. v. People ex rel. etc.*, 140 Ill., 545; 80 N. E. Rep. 678, is a recent and well considered case on the above question. The water pipes and electric poles and wires of the water company were assessed as personal property. The pipes were laid and wires strung in the public streets, except for short distances, where they connected with the works on the property of the company. The company objected on the ground that the pipes, poles and wires should have been assessed as real estate. The supreme court sustained the assessment, and in its opinion says :

"The first objection is that these mains and wires are a part of the realty, and were therefore improperly assessed as personalty. By express provision of our revenue act, gas mains and pipes laid in roads, streets, or alleys are declared to be personal property, and are required to be listed and assessed as such. Rev. St. c. 120, § 16 ; 2 Starr & C. p. 2034. No such provision, however, exists in regard to water-mains or electric poles and wires. There are authorities which hold that the mains of a gas company are appurtenant to its lots, and are taxable as realty, unless it is otherwise provided by statute. *Capital City Gas-Light Co. v. Charter Oak Ins. Co.*, 51 Iowa, 31 ; 50 N. W. Rep. 579 ; *Gas Co. v. Thurber*, 2 R. I. 15. Under the doctrine of such authorities, it would seem that water-mains and electric wires should be assessed as part of the realty, where there is

* Reported in 27 Atl. Rep. 143.

no statutory provision directing otherwise; and in Iowa such water-mains have been held to be real estate, and treated as appurtenances to the water-works. Appeal of the Des Moines Water Co., 48 Iowa, 324. There are other authorities, however, which hold that gas-mains in the streets of a city are personalty. In *People v. Board of Assessors*, 89 N. Y. 81, it was said: 'These mains, running under the streets of the city, not being erected upon or affixed to the relator's land, cannot be regarded as real estate, under the statute, for the purpose of taxation. The mains are not 'real estate,' as that term is defined in the statute regulating the assessment of taxes, and I do not think they can be held as fixtures, under the common doctrine upon that subject.' In *Memphis Gas-Light Co. v. State*, 6 Cold. 310, the supreme court of Tennessee say: 'It is insisted that the pipes used for conveying the gas manufactured to the consumers, and laid down, not upon the land of the company, but through and under the public streets of the city, are not a part of the manufacturing establishment. Pipes laid through the streets of the city in the manner above mentioned, by permission of the corporate authorities, do not become the property of the city or a part of the realty. They are personal property, and the property of the company.' So far as the application of this doctrine is concerned, there is no difference between the mains and the wires. In this conflict of authority we are inclined to hold that these mains and wires are personalty, as this view is in harmony with the spirit, if not the letter, of our own statutes, and with the tone of our own decisions. In *Johnson v. Roberts*, 102 Ill. 655, it was claimed that certain machinery in a building had been improperly assessed as personal property, because the engines and boilers were permanently attached to and were a part of the realty; and we there held that, although the engines and boilers would be regarded as permanent fixtures and part of the realty at common law, and as between grantor and grantee, yet that the legislature has the power to declare personal property to be realty, and realty to be personal property, for the purposes of taxation; that it had changed the rule so far as the facts of that case were concerned; that the engines and boilers, though attached to the realty, were to be treated as personalty under the twenty-fifth section of the revenue act, which mentions 'every steam-engine, including boilers and the value thereof,' as the sixth item in the schedule of personal property. 2 Starr & C., p. 2036. The evidence in the case at bar shows that the machinery in appellant's building, used for forcing water into the mains and furnishing electric light to the city, 'consists of two Worthington pumping engines, two tubular boilers, one New York safety high-speed power engine, and one electric dynamo and fixtures.' The mains and wires, being directly connected with these engines and boilers, which are personal property for the purposes of taxation under the doctrine of the Johnson Case, can as well be held to be a part of the machinery as of the realty to which the machinery is attached. If they are a part of the engines and boilers with which they are connected, they may, like such engines and boilers, be regarded as personal property for the purpose of taxation. In *Com. v. Lowell Gas-Light Co.*, 12 Allen, 75, it was held that the gas mains and pipes, laid down in the streets for the purpose of distributing gas to the consumers, constituted a part of the machinery in operation at the gas-works. So, also, in *Memphis Gas-Light Co. v. State*, supra, it was held that the pipes were a part

of the apparatus for the delivery of gas to the consumers; that the delivery was as much within the purpose of the creation of the gas company as the manufacture; that the apparatus for delivery was merely an extension and continuation of the apparatus for manufacture; and that both belonged to the manufacturing establishment. In the present case the water mains and electric wires are a part of the apparatus for the delivery of water and light to the inhabitants of the city, and, as such, constitute a part of the machinery, including the engines and boilers, which is located in appellant's building. We think that the mains and wires were properly assessed as personal property."

In Iowa the whole plant of a water or gas company, including its works, mains, hydrants, etc., is regarded as real estate, and is assessed in the township where the main works are located. *Oskaloosa Water Co. v. Board* (Iowa), 51 N. W. Rep. 18; *Capital City Gas Light Co. v. Charter Oak Ins. Co.*, 51 Iowa, 31; 50 N. W. Rep. 579; *Case of Des Moines Water Co.*, 48 Iowa, 324.

In *Tide-Water Pipe Co. v. Berry*, 53 N. J. L. 212; 21 Atl. Rep. 490, it was held by the court of errors and appeals that: A foreign corporation owning a "pipe-line" for carrying petroleum, which is laid underground under a grant by the owner of the fee, is taxable for the "pipe-line" as real estate in the township where it is located, under the definition of "real estate," contained in the third section of the act of 1866, although the owner of the fee has reserved the use of the surface for cultivation, etc. This affirms the decision of the supreme court in the same case referred to in the principal case and reported in 52 N. J. Law, 308; 19 Atl. Rep. 665. The statute in question enacted that real estate should "be construed to include all lands, all water power thereon or appurtenant thereto, and all buildings or erections thereon or affixed to the same, trees and underwood growing thereon, and all mines, quarries, peat and marl beds, and all fisheries."

In *Monroe Water Co. v. Frenchtown* (Mich.), 57 N. W. Rep. 268, it was held that the pipes of a water company extending from its pumping machinery to a lake, *and not shown to be laid on land not owned or controlled by it*, are real property, within 8 How. St. § 1170a, which provides that "real property shall include all lands and buildings and fixtures thereon and appurtenances thereto."

In addition to the cases above referred to or cited in the opinions the following may be consulted: *West Chester Gas Co. v. Chester County*, 80 Penn. St. 232; *Stein v. Mobile*, 24 Ala. 591; *Stein v. Mobile*, 17 Ala. 284; *Stein v. Mobile*, 49 Ala. 362.

CITY AND COUNTY OF SAN FRANCISCO v. COLLINS ET AL.

(Supreme Court of California, May 12, 1893.)

1. EMINENT DOMAIN. OWNER ENTITLED TO NECESSARY COSTS OF PROCEEDINGS. CONSTITUTIONAL LAW. Since Const. art. 1, § 14, declares that private property shall not be taken for public use without just compensation to the owner, where land is condemned for a street at the suit of a city, the owner is entitled to recover his necessary costs incurred in making a *bona fide*

defense, though Code Civil Proc. § 1255, provides that in such proceedings “costs may be allowed or not, and, if allowed, may be apportioned between the parties on the same or adverse sides, in the discretion of the court.”

Henry E. Highton, for appellants. *John H. Durst*, for respondent.

VANCLIEF, C. This was a special proceeding in the superior court to condemn lands of the defendants for the widening of Mission street, in said city, in which judgment passed for plaintiff. The appeal by the defendants is from an order apportioning the costs between the parties. Each party claimed costs, and filed a verified memorandum of the items thereof. The items of plaintiff's memorandum are as follows:

Sheriff's fees.....	\$	9	00
Clerk's fees.....		7	50
Jury fees.....		312	00
Reporter's fees.....		140	00
Notary's fees.....		2	00
Entering judgment.....		4	00
Constable's fees, serving 14 subpoenas.....		5	00
Sheriff in charge of jury.....		3	00
2 meals for sheriff and jury.....		13	00
			<hr/>
			\$495 50

Witness Fees.

Dr. Confell, 2 dates of attendance.....		4	00
Mertens, 2 dates of attendance.....		4	00
Lewis, 15 dates of attendance.....		30	00
Von Rhein, 2 dates of attendance.....		4	00
Magee, 1 date of attendance.....		2	00
Chester, 6 dates of attendance.....		12	00
Robinson, 4 dates of attendance.....		8	00
J. J. Haley, 4 dates of attendance.....		8	00
Quinn, 4 dates of attendance.....		8	00
Russell, 2 dates of attendance.....		4	00
Cody, 15 dates of attendance.....		30	00
Stern, 1 date of attendance.....		2	00
Lowell, 2 dates of attendance.....		4	00
Baldwin, 2 dates of attendance.....		4	00
			<hr/>
			124 00
			<hr/>
			\$619 50

The items claimed by defendants are the following:

Sheriff's fees.....	\$ 3 00
Clerk's fees, trial fees.....	4 00
Jury fees, 13 days, at \$24 per day.....	312 00
Reporter's fees, 14 days, at \$10 per day.....	140 00
Notary's fees.....	3 00
Clerk's fee, entry of judgment.....	4 00
Serving subpoenas, 12.....	6 00
2 meals for jury on October 3, 1891.....	13 00

Witness Fees.

A. T. Penebsky.....	4 00
Dr. C. A. Clinton.....	2 00
John Grabolle	2 00
J. W. Fish.....	4 00
J. C. Zignago.....	2 00
Wm. Byrnes.....	2 00
P. Isola.....	4 00
Fred'k W. Deiling.....	2 00
Thos. Moran.....	2 00
John McCarthy.....	2 00
Michael Fay.....	2 00
Daniel L Newkirk.....	2 00
	<hr/>
	\$515 00

Besides objecting generally to plaintiff's cost bill, on the ground that plaintiff was not entitled to recover any cost, the defendants filed special written objections to each item thereof on various other grounds. But no objection appears to have been made by plaintiff to any item of defendants' bill, on the ground that it had not been necessarily expended or incurred by defendants in the proceeding. It appears that, on the morning of each day during the trial, each party, in obedience to a rule of court, deposited with the clerk the full amount of the fees of the reporter and the jury for one day, viz., \$34; and, at the close of the trial, occupying thirteen days, the deposits of each party amounted to \$442. The order of the court appealed from was, in effect, that each party pay one-half of the fees of the jury and reporter (\$221), and, with this excep-

tion, that neither party recover any cost from the other. The effect of the order upon the appellants is to compel them to pay one-half of the jury and reporter's fees, and the whole of all other costs incurred solely by them, which amount to \$267, composed of the following items: One-half of jury and reporter's fees, \$221; sheriff's fees, \$3; clerk's fees, \$4; notary's fees, \$3; serving subpoenas on 12 witnesses, \$6; fees of 12 witnesses for defendants, \$30. All other costs to be borne by the plaintiff. Counsel for appellants contend that respondent should have been required to pay not only its own costs, but all proper costs of the defendants; because, to subject the defendants to payment of any portion of the costs is an infringement of their constitutional right to full and just compensation for the taking and damaging of their lands. As a general proposition, applied to proper costs incurred in good faith, I think this point should be sustained. Section 1255 of the Code of Civil Procedure, however, provides that, in proceedings to condemn property for public use, "costs may be allowed or not, and, if allowed, may be apportioned between the parties on the same or adverse sides, in the discretion of the court;" and it is claimed by respondent that the order of the court below, allowing and apportioning the costs, was a proper exercise of the discretionary power conferred by this section. But this power must be limited by section 14, art. 1, of the constitution, which provides that "private property shall not be taken or damaged for public use without just compensation having been first made to or paid into court for the owner." In proceedings to condemn, the burden of proving the compensation to which they are entitled is cast upon the defendants, who are also entitled to contest the material allegations of the complaint. To require the defendants in this case to pay any portion of their costs necessarily incidental to the trial of the issues on their part, or any part of the costs of the plaintiff, would reduce the just compensation awarded by the jury, by a sum equal to that paid by them for such costs. As a result of the authorities upon this point, Mr. Lewis, in his work on Eminent Domain, section 559, says: "It seems to us that courts should be guided by the following principles and considerations in the matter: By the constitution the owner is entitled to just compensation for his property taken for public use. He is enti-

tled to receive this compensation before his property is taken or his possession disturbed. If parties cannot agree upon the amount, it must be ascertained in the manner provided by law. As the property cannot be taken until the compensation is paid, and as it cannot be paid until it is ascertained, the duty of ascertaining the amount is necessarily cast upon the party seeking to condemn the property, and he should pay all the expenses which attach to the process. Any law which casts this burden upon the owner should, in our opinion, be held to be unconstitutional and void." In *Re New York, W. S. & B. R. Co.*, 94 N. Y. 287, the question was whether the company was entitled to recover costs from the owners of the land condemned, and upon this point the court of appeals, by Rapallo, J., said: "In such a case to compel the landowners to pay any part of the expenses incurred by the company for the purpose of ascertaining the compensation * * * would conflict with the constitutional right of the landowners to just compensation. They are entitled to the full amount of their damages when finally ascertained, and this amount cannot be diminished by allowing to the company its own expenses incurred in ascertaining it, or in endeavoring to reduce it; * * * and a case may be supposed where the costs and expenses of the company would absorb a large part, or even the whole, of the award. There is no warrant in the statute for awarding such costs, and, if there were, it would be a violation of the constitutional right of the landowner." See, also, *Railroad Co. v. Bull*, 20 Ill. 218. No doubt the court has power to determine what are proper and what are improper items of cost in proceedings of this kind, and to disallow such as are improper, as in other cases. For example, unnecessary expenditures, made in bad faith, for the purpose of increasing the costs or obstructing the proceeding, are not properly taxable as costs, and may be disallowed; and cases may possibly arise in which a portion of the expense of the party seeking to condemn may be properly charged and apportioned to the landowner, on the ground that such expense was caused and incurred only by reason of unnecessary obstructive proceedings of the latter, interposed in bad faith; but no question as to these matters is involved in this appeal. The verified bill of costs filed by the

appellant was *prima facie* evidence that the items thereof had been necessarily incurred; and since no objection was made in the trial court, nor here, on the ground that they were not proper costs necessarily incurred, the *prima facie* evidence must be taken as conclusive for the purpose of this appeal. I think appellants are entitled to recover their costs, amounting to \$267, composed of the items as above stated; that the order appealed from should be reversed, and the court below directed to enter an order in accordance with this opinion.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is reversed, and the court below is directed to enter an order in accordance with this opinion.*

Eminent domain—costs of proceedings.—The recent case of *Dolores No. 2 Land & Canal Co. v. Hartman*, 17 Colo. 188; 29 Pac. Rep. 878 is in accord with the principal case. Referring to the constitutional provision that private property shall not be taken or damaged for public use without just compensation, the court says: "The undeniable intent of this provision is to secure the land owner, whose property is taken against his will, a fair compensation therefor. It cannot have been the purpose of the constitutional convention to require payment by the owner of costs reasonably incurred in the proceeding whereby his premises are taken. In some instances such costs will amount to nearly or quite as much as the compensation awarded. But, if the owner must disburse for costs, the money received for his land, the compensation cannot be regarded as 'just,' within the meaning of the constitutional guaranty. However it might be as to attorneys' fees and other like expenses, we do not hesitate to say that the spirit of the constitution clearly covers the class of expenses usually taxed as costs. Hence, though it be conceded that the statute relating to costs in ordinary civil actions cannot apply, courts should nevertheless award them to respondents in condemnation proceedings. We do not assert that if respondent appeals from an award, the legislature or court may not make a reasonable regulation or order requiring him, under proper circumstances, to bear the whole or a part of the costs of the appeal. * * * Nor does the foregoing view burden petitioner with the payment of costs contumaciously or unreasonably incurred by a respondent during the progress of the proceedings."

The subject of costs in condemnation proceedings is treated in *Lewis Em. Dom.*, §§ 559-568. For the construction of particular statutes, see *Lake Erie & W. R. Co. v. Kokomo*, 130 Ind. 224; 29 N. E. Rep. 780; *Hester v. Commissioners*, 84 Mich. 450; 47 N. W. Rep. 1097; *Taylor v. Chicago, etc., R. Co.* 88 Wis. 645; 53 N. W. Rep. 855.

* Reported in 33 Pac. Rep. 56.

A statutory provision that "the costs of proceedings up to and including the filing of the report of the commissioners shall be paid by the city," does not authorize the allowance as costs against the city of attorney's fees, charges of expert witnesses, and other similar expenses incurred by the land owner in developing the character and extent of deposits of clay claimed by him to exist on lands sought to be appropriated for city purposes. *City of St. Louis v. Meintz*, 107 Mo. 611; 18 S. W. Rep. 30. As to the allowance of attorneys' fees as "cost and expense" of proceedings see *Taylor v. Chicago, etc., R. Co.*, 83 Wis. 645; 53 N. W. Rep. 855.

FLORIDA CENT. & P. R. CO. v. STATE EX REL. TOWN OF TAVARES.

(Supreme Court of Florida, May 18, 1893.)

1. RAILROAD COMPANIES. MANDAMUS TO ESTABLISH STATION. PROPER RELATOR. When *mandamus* is resorted to for the purpose of enforcing a private right, the person interested in having the right enforced must be the relator. In such case the relator is considered the real party, and his right to the relief must clearly appear; but where the object is the enforcement of a public right the people are regarded as the real party, and the relator need not show that he has any legal interest in the result. It is enough that he is interested as a citizen in having the laws executed and the duty in question enforced.

2. MANDAMUS TO ENFORCE CONTRACTS. *Mandamus* never lies to enforce the performance of private contracts.

3. VALIDITY OF CONTRACT WITH RAILROAD COMPANY TO LOCATE DEPOT. Contracts undertaking to obligate a railroad company to establish its depot exclusively at a particular point are void as against public policy. Such companies should be left free to establish and re-establish their depots wherever the public welfare or wants of the public may require.

4. MANDAMUS TO LOCATE DEPOT. DESIGNATION OF PARTICULAR SPOT. The courts are not authorized by *mandamus* to so far control a railroad company's discretion in the matter of the location of its depot buildings as to indicate in any case the exact spot of such location.

5. PRACTICE IN MANDAMUS. FORM OF ALTERNATIVE WRIT. The mandatory part of an alternative writ of *mandamus* must conform to the case made by the recitals in such writ, and must not require more to be done than is justified by such recitals.

6. THE DUTY COMMANDED MUST BE CLEARLY DEFINED IN WRIT. The range of action required of the respondent by an alternative writ of *mandamus* should be clearly, particularly, and explicitly set forth in the mandatory part of such writ. The duty commanded should not be left to indiscriminate outside ascertainment dehors the writ.

Wall & Knight and *John A. Henderson*, for plaintiff in error.
Alex. St. Clair-Abrams, for defendants in error.

TAYLOR, J. On the 11th of March, 1891, an alternative writ of *mandamus* was granted and issued by the judge of the circuit court in and for Lake county, in the seventh judicial circuit, upon the petition of the state on the relation of the mayor, inhabitants, and town of Tavares, against the corporate plaintiff in error, the Florida Central & Peninsular Railroad Company. Upon the denial of a motion to quash the alternative writ, and the sustaining of a demurrer to the respondent's answer, a peremptory writ was awarded, and from this judgment the respondent takes error.

The alternative writ, which contains all the recitals in the petition making application therefor, is as follows :

"Whereas, the state of Florida, on the relation of the mayor, inhabitants, and town of Tavares, has filed its petition for *mandamus*, and it appearing from the allegations of the petition that the Florida Central & Peninsular Railway Company, successors to the Florida Railway & Navigation Company, is a corporation duly chartered under the laws of the state of Florida, and doing business in said state, and within the limits of the town of Tavares, and that said town of Tavares has been a regularly established station of and for said railway for more than six years past, and that, when the said railroad was first constructed, Alex. St. Clair- Abrams, in his own person, gave the said railway the right of way in the said town, and also a block of land known as 'Shore Park,' the consideration for which was that said railway company should cause to be constructed on said block of land a passenger depot, and that all passenger trains of said railway company should stop at such passenger depot; and that the inhabitants and town of Tavares assented to the use and occupancy of the streets and avenues of said town by said railroad upon the understanding and condition that the passenger depot would be constructed on the block known as 'Shore Park,' said block being the best situated and most convenient to the people of Tavares, and that by reason of establishing a station in said town of Tavares, and by reason of its receipt of the land herein described, it became, and was, and still is, the duty of said railway company to construct a passenger depot on said block in said town of Tavares for the proper use and accommodation of the public; that the said Florida Central and Peninsular Railway Company has failed to construct any passenger depot whatever in

said town, but stops its trains in the public streets in said town, exposing its passengers and the public to great inconvenience and hardship; that in winter, while the public await the trains of said company, the only accommodation they have are bonfires lit in the public streets, around which the public have to cluster to obtain warmth; that, no provision whatever being made for the public, passengers in said town are compelled to go to the water-closets on the cars while they are standing in said streets, to answer the calls of nature, and human *feces* and *urine* are deposited on the public streets or public highway in said town, to the great scandal and injury of said town and the inhabitants thereof; that in rainy weather the public are compelled to remain uncovered in the rain, or to seek shelter in adjacent stores and buildings, because of the failure of the said railway company to perform its duty of constructing suitable railroad accommodations; that the Florida Central and Peninsular Railway Company, the successor of the Florida Railway & Navigation Company in the ownership, control, and operation of said railroad, still permits the scandalous and outrageous condition of affairs to exist in said town; that, although repeatedly requested to construct suitable depot accommodations in said town, it has failed and refused to construct any whatever, and, by reason of its failure so to do, great injury, damage, and inconvenience has resulted, to the injury of the inhabitants of said town, and to the town itself; that the Florida Central & Peninsular Railway Company has taken possession of, and uses, controls and claims the ownership of, the lands deeded to the Florida Railway & Navigation Company, including the block of land known as 'Shore Park,' deeded for a passenger depot, said block being bounded on the east by St. Clair-Abrams avenue, and on the north by Tavares boulevard, but that the said railroad company utterly refuses to construct any depot on said block, or to construct any depot whatsoever in said town; that heretofore the said railroad company has stopped its passenger trains at the foot of Joanna avenue, in said town, where no depot accommodations whatsoever exist, and that the trains still stop at the foot of said avenue, but that on the 3d of January, 1891, the agents and employes of said railroad company were engaged in measuring the distance from defendant's railroad track near a large marsh to the post office,

and that the petitioner is informed and believes that it is the purpose and intention of said railroad company to hereafter stop its trains near the edge of said marsh; that nearly the entire built-up portion of said town is east and north of said marsh; that the purpose of the defendant is to further annoy and injure the inhabitants of the town of Tavares; that if the passenger trains of defendant are stopped there, it will not only inconvenience, but will inflict great injury upon, said inhabitants and upon said town; that said marsh is unhealthy, and abounding in malaria; that it presents an unsightly appearance, is forbidding in aspect, and is calculated to impress a stranger most unfavorably of said town and said inhabitants; that it will force said inhabitants and the public to additional inconvenience and expense in going to and from the cars of defendant; that the locality is utterly unfitted for a passenger depot, of which fact the defendant is aware; that the block of land known as 'Shore Park' is the best situated and most convenient for a passenger depot in said town, being only about 250 feet from the post office, and less than 300 feet from the principal hotel, and from ten of the fourteen stores in said town, and the most accessible to nearly all of the residences in said town; that it is the duty of the defendant as a public carrier to construct all needed depot accommodations at every one of its stations; that the town of Tavares is an important station on defendant's road; that said town is the county seat of said Lake county; that it is the junction of five railroads; that the defendant has a large business in said town, both of freight and passengers, and that great wrong and injury has been done to said the town and inhabitants thereof by the failure and refusal of the defendant to construct necessary depots; that by reason thereof the inhabitants of said town and the traveling public have been exposed to sickness and to suffering, and the public health has been endangered: It is therefore ordered that the respondents, the Florida Central and Peninsular Railway Company, proceed immediately to construct, or to have constructed, in the town of Tavares, on the block of land therein formerly known as 'Shore Park,' and bounded on the east by St. Clair-Abrams avenue and on the north by Tavares boulevard, a suitable depot for the accommodation of passengers, said depot to be constructed in conformity with the ordinances of

said town, and to be completed by the first Monday in June, 1891, and to stop all their passenger trains at said passenger depot for the reception and delivery of passengers; or to show cause, if any they have, by the first Monday in June, A. D. 1891, why they have not obeyed this writ. Done at chambers, at De Land, Volusia county, Florida, this 11th day of March, A. D. 1891. John D. Brome, Judge."

The respondent's motion to quash this writ was upon the following grounds:

"(1) There are no sufficient parties to said relation.

"(2) There is a misjoinder of parties to the relation.

"(3) The inhabitants of the town of Tavares have each their individual, full, and complete legal remedy for any and every grievance against the respondents.

"(4) No obligation of contract between Alex. St. Clair-Abrams and the Florida Railway & Navigation Company, as charged, furnished a legal basis for redress for any breach thereof, to the relators, or either of them, by *mandamus*.

"(5) There is no allegation in the relation of the existence of any ordinance of the town of Tavares in reference to the mode and manner of constructing a depot to support the requirement in the alternative writ that said depot be constructed in conformity with the ordinances of the said town.

"(6) There is no law of the state of Florida requiring the respondent to erect depots for the accommodation of passengers at the said station, nor for designating a place at said station where the same should be placed."

The refusal of the court to grant this motion is assigned as error. We shall confine our remarks to the points raised by this motion to quash, as a discussion of them will completely dispose of all questions involved in the case.

In support of the first ground of the motion to quash it is urged for the plaintiff in error that, the proceeding having been instituted for the enforcement of a public right, no citizen or number of citizens, in their individual or collective capacity as such, would be entitled to the writ, but that the application for it should have been made by the attorney general. While there are many cases in several of the states that sustain this contention, yet the decided weight and preponderance of the authorities establish the

following to be the correct rule as to who are proper relators in *mandamus* proceedings: "When the remedy is resorted to for the purpose of enforcing a private right, the person interested in having the right enforced must be the relator. The relator (in such case) is considered the real party, and his right to the relief must clearly appear; but where the object is the enforcement of a public right the people are regarded as the real party, and the relator need not show that he has any legal interest in the result. It is enough that he is interested as a citizen in having the laws executed, and the duty in question enforced." 14 Amer. & Eng. Enc. Law, 218, and authorities there cited. The above has been adopted by this court as being the correct rule in *McConihe v. State*, 17 Fla. 238, and in *State v. Crawford*, 28 Fla. 441, 10 South Rep. 118.

The second ground on the motion to quash is that there is a misjoinder of parties as relators. The writ was issued in the name of the state of Florida *ex relatione* "The Mayor, Inhabitants and Town of Tavares." The contention of the respondent is that the mayor in his official character and the inhabitants in their individual capacity, have no such similitude of duty or interests as makes it proper to have them joined as relators. Under our laws for the incorporation of cities and towns such towns are required, as part of the process of incorporation, to adopt a corporate name, and by such corporate name they can sue and be sued. Sections 4, 8, pp. 246, 247, McClel. Dig.; sections 661, 665, Rev. St. There was no necessity to have used the words "mayor and inhabitants" in this proceeding. The accurate practice would have been simply to use the corporate name of the town as being the relator (1 Dill. Mun. Corp. [3d Ed.], section 237, note 1), as it was evidently the intention of the pleader to make the municipal corporation, "Town of Tavares," the relator in the case. But, the object of the proceeding being to enforce the performance of a public duty, under the rule as above announced the state is to be considered here as the real party; and as the town of Tavares by its corporate name is included as a relator, we can see no harm that could result from treating the words "mayor and inhabitants" as immaterial surplusage, particularly as the mayor is not individually named, and no individual inhabitant is named. The suit, according to the rule, could have been instituted on the rela-

tion of any citizen of the town of Tavares, or several of its citizens could have united as relators. The town of Tavares, being a corporation of the state, having the general power as such to sue and be sued, could also, in such a case, be the relator in its corporate capacity. The object of the proceeding being to enforce a public duty, so long as it is instituted and conducted in the name of the state, who, in such cases, is the real party, it is not a matter of so much moment as to who is the relator, as that the proceedings will be quashed because of any mere technical misjoinder of the parties as relators.

The third ground of the motion to quash contends that there is ample remedy at law for the relief sought here by *mandamus*. The sixth ground of the motion to quash is that there is no law of the state of Florida requiring the respondent to erect depots for the accommodation of passengers at the said station, nor for designating the place at such station where the same shall be located. These two grounds of the motion present the question as to whether the power exists in the courts, in the absence of legislation expressly and specifically prescribing it as a legal duty to be performed by such companies, to compel railroad companies by *mandamus* to establish stations along their lines, and to erect and maintain thereat depot buildings for freight and passengers. From the specific relief sought by the writ in this case it becomes unnecessary for us to pass upon this question, since to pass upon it with the pleadings herein constructed as they are would be adjudicating an abstract proposition not properly presented. Without, therefore, even intimating any conclusion of our own upon the question, we deem it proper to say that there is weighty and serious conflict in the authorities as to whether the courts can in any case compel a railroad company to establish a station, or to erect and maintain thereat depot buildings, unless there is legislation in express terms making it a legal duty that they must perform, in contradistinction to a discretionary power that they are authorized to carry out or not, as they see fit. Some of the authorities hold that, independently of any legislation, it is a common-law duty that such companies owe to the public, and that it will be enforced by *mandamus*. *Northern Pac. R. Co. v. Territory*, 3 Wash. T. 303; 13 Pac. Rep. 604; *State v. Republican Val. R. Co.*, 17 Neb. 647; 24 N. W. Rep. 329; *McDonald v.*

Railroad Co., 26 Iowa, 124; People v. Chicago & A. R. Co., 130 Ill. 175; 22 N. E. Rep. 857. Other authorities, upon the ground that the broad discretion vested in these companies in such matters by their charters is beyond the reach of judicial interference or control, hold that the courts cannot interfere unless the duty is made a clear one by express legislative enactment. People v. New York, L. E. & W. R. Co., 104 N. Y. 58; 9 N. E. Rep. 856; Northern Pac. R. Co. v. Territory, 142 U. S. 492; 12 Sup. Ct. Rep. 283, overruling 3 Wash. T. 303; 13 Pac. Rep. 604, *supra*. The case made, however, by the alternative writ before us does not seek merely to compel the erection of a depot building on the line of the respondent's road, at some point at or near the town of Tavares that will be reasonably subservient to the wants and convenience of the inhabitants and business of that community, leaving the exact spot of its location there to the discretion necessarily vested in the company in such matters, but the sole demand of the writ is that the respondent company shall be compelled to erect a depot building on the particular lot in said town known as "Shore Park."

There is no better settled elementary principle in the law of *mandamus* than that the writ will never lie to enforce the performance of private contracts. Merrill Mand. § 16, and numerous authorities there cited; High Extr. Rem. § 25, and authorities cited; State v. Patterson, N. & N. Y. R. Co., 43 N. J. Law, 505; Parrott v. City of Bridgeport, 44 Conn. 180. Besides this principle, in so far as the alternative writ would seem to predicate its contention for the location of the depot upon the exact spot known as "Shore Park" upon the private contract between Alex. St. Clair-Abrams and the town of Tavares on the one hand and the railroad company on the other, it seems to be universally well settled that contracts undertaking to obligate a railroad company to establish its depots exclusively at a particular point are void as against public policy. In Marsh v. Railway Co., 64 Ill. 414, where the effort was made by bill in equity to enforce the specific performance of such a contract, the court says: "The location of railroad depots has much to do with the accommodation of the wants of the public; and, when once established, a change of affairs may require a change of location, in order to suit public convenience. We cannot

admit that an individual is entitled to call for the interference of a court of equity to compel a railroad company to locate unchangeably its depot at a particular spot to subserve the private advantages of such individual. Railroad companies, in order to fulfill one of the ends of their creation—the promotion of the public welfare—should be left free to establish and re-establish their depots wheresoever the accommodation of the wants of the public may require. To grant the relief asked for by the complainant we would regard as against public policy.”

In *People v. Chicago & A. R. Co.*, 130 Ill. 175; 22 N. E. Rep. 857, the court says: “It is in recognition of the paramount duty of railway companies to establish and maintain their depots at such points and in such manner as to subserve the public necessities and convenience, that it has been held by all the courts, with very few exceptions, that contracts materially limiting their power to locate and relocate their depots are against public policy, and therefore void.” The same doctrine was announced by Chief Justice Shaw in *Fuller v. Dame*, 18 Pick. 472; and also in *Railroad Co. v. Ryan*, 11 Kan. 602; *Railroad Co. v. Seeley*, 45 Mo. 212; *Currie v. Natchez, J. & C. R. Co.*, 61 Miss. 725. In *Mobile & O. R. Co. v. People*, 132 Ill. 559; 24 N. E. Rep. 643, the court says: “The location of stations for the receipt and discharge of passengers and freight at points most desirable for the convenience of travel and business being indispensable to the efficient operation of a railroad and the enjoyment of it by the public, the railway company cannot be compelled, on the one hand, to locate stations at points where the cost of maintaining them will exceed the profits resulting therefrom to the company, nor allowed, on the other hand, to locate them so far apart as to practically deny to the communities on the line of the road reasonable access to its use. A railway company cannot be compelled to maintain or continue a station at a point, when the welfare of the company and the community in general requires that it should be changed to some other point. A railway company cannot bind itself, by contract with individuals, to locate and maintain stations at particular points, or to not locate and maintain them at other points. The company must be left free to establish and re-establish its depots wherever the public welfare or wants of the public may require.” The same doctrine is held in *Holliday v. Patterson*, 5

Or. 177, in which case the court says: "A railroad company is a quasi public corporation, and the public have an interest in the location of their lines of road and depots. An agreement which tends to lead persons charged with the performance of trusts or duties for the benefit of others to violate or betray them will not be enforced." *Railway Co. v. Marshall*, 136 U. S. 393; 10 Sup. Ct. Rep. 846.

Counsel for the relator contends, however, in his briefs filed here, that the right to compel the location of the depot on Shore Park is not predicated upon the contract between Mr. St. Clair-Abrams and the town of Tavares on the one hand and the railroad company on the other, but that the allegations as to this contract contained in the writ are merely by way of recital to show that the company owned sufficient and suitable land for depot purposes, donated for such purpose, and that such land is most convenient for public use, and to forestall any claim by the company that they were without land in a convenient part of the town for depot purposes. Conceding, for the purposes of this case, that the alternative writ as framed will permit this contention, still the law will not, in our judgment, authorize the court to dictate the exact spot of the location of the depot building or to confine its location to any particular lot or block of ground. All of the authorities *supra* bearing upon this question agree that a very broad discretion is vested in these companies by their charters in the matter of the location of their roads, stations, depots, etc.

We have been unable, after the most laborious search, to find a single case where any court has ever undertaken to so far encroach upon this discretion as to dictate the exact spot of the location of one of its depot buildings; and, though the power may lie in the courts, upon a proper case made, and without legislation expressly enjoining it as a specific legal duty, to compel railroad companies to erect depot buildings at their stations, so that the convenience of the public there will be reasonably and measurably subserved, still we are perfectly satisfied from the authorities cited that the courts are not authorized to so far control the company's discretion in the matter as to dictate in any case the exact spot of the location of one of its depot buildings; but such exact location must, of necessity, in every case, be

left to the company's discretion to determine, limited only by the condition that it must be so located as to be reasonably subservient to the convenience of the community to be accommodated thereby. In reaching this conclusion we have not failed to consider that the language of our statute empowering railroads to build and maintain depots is permissive only, and not mandatory; but, even if it were mandatory as to the duty to erect depots, our conclusion would remain the same, that the effort of this writ to dictate its exact location could not be sustained.

In the mandatory part of the alternative writ, to which the peremptory writ also conforms, the respondent is required, not only to construct a depot upon the particular lot known as "Shore Park," but to construct it "in conformity with the ordinances of said town." Neither in the relator's petition for the writ nor in the recitals of the alternative writ is there any mention whatever of the existence of any ordinance of said town prescribing any regulations as to buildings of any kind in said town. This defect in the alternative writ constituted the fifth ground of the respondent's motion to quash. It is well settled that great care, particularly, and certainty is required in the preparation of the mandatory part of the alternative writ, and that it must conform to the case made by the recitals in the writ, and must not require more to be done than is justified by the recitals. *Merrill*, Mand. § 260; *Hartshorn v. Assessors*, 60 Me. 276; *King v. Church Trustees of St. Pancras*, 1 Nev. & P. 507; *Fisher v. Mayor, etc.*, 17 W. Va. 628; *State v. State Board of Health*, 103 Mo. 22, 15 S. W. Rep. 322; *People v. Brooks*, 57 Ill. 142; *Tapp. Mand.* 371. Another rule applicable to mandamus that seems to be equally well settled is "that the range of action required of the respondent cannot be left to indiscriminate outside ascertainment, nor can he be required to look dehors the writ to ascertain his duty." *Merrill*, Mand. § 260; *Cross v. Railway Co.*, 34 W. Va. 742, 12 S. E. Rep. 765; *Hartshorn v. Assessors*, *supra*; *State v. Mobile & M. Ry. Co.*, 59 Ala. 321. The requirement of the respondent to construct its depots in conformity with the ordinances of the town of Tavares not only overstepped the case as made by the recitals in the petition and writ, but left the respondent's duty thereunder in a state of uncertainty, to be ascertained from the town ordinance, if there was any, entirely dehors the writ.

The motion of the respondent to quash the alternative writ should have been granted.

The judgment of the court below is reversed, and the cause remanded for such further proceedings as shall not be inconsistent herewith*

Railroad companies—contract to establish station—validity and enforcement.—As to the validity and enforcement of such contracts, see *Conger v. New York, etc., R. Co.*, 2 Am. R. R. & Corp. Rep. 190 and note. The duties of railroads in general in regard to the establishing and maintaining of stations, has received elaborate consideration in the cases of *Mobile & Ohio R. Co. v. People*, 132 Ill. 559; 2 Am. R. R. & Corp. Rep. 476, and *Northern Pac. R. Co. v. Washington*, 142 U. S. 492; 5 Am. R. R. & Corp. Rep. 353; *State v. Des Moines, etc., R. Co.*, *ante*, p. 1.

ATCHISON, T. & S. F. R. CO. v. HEADLAND.

(Supreme Court of Colorado, May 29, 1893.)

1. **COMMON CARRIERS. WHO ARE PASSENGERS. TRESPASSERS.** Deceased asked a freight conductor on defendant's railroad to carry him free to a certain point, saying that he had formerly been a railroad man, and was a cripple. The conductor refused. After the train had proceeded some distance, however, the conductor found deceased in the caboose. There were also in the caboose several persons traveling with stock, as well as a fireman seeking employment, none of whom were provided with transportation, or paid fare. The conductor, not liking to put deceased off late at night, in the open country, allowed him to ride. Held, that deceased was not a passenger, within Mills' Ann. St. § 1508, furnishing a right of action for injuries to passengers in certain cases.

2. A person riding in the caboose of a freight train is presumed not to be a passenger, until the contrary is made to appear.

THIS action was brought under the statute by appellee, as plaintiff, to recover damages for the death of her unmarried son, alleged to have resulted from the negligence of the defendant. The trial resulted in a verdict and judgment in favor of plaintiff for \$3,500. The case was submitted to the jury on the theory that the defendant had assumed towards the deceased the duties and obligations due from a common carrier to a passenger, and this forms the ground of the principal error relied upon in

* Reported in 13 So. Rep. 103.

this court. Appellant contends that the deceased was not entitled to be considered as a passenger, under the evidence. The evidence upon this point is practically without contradiction. From this it appears that on May 14, 1888, between the hours of twelve and one o'clock at night, one Walter Chubbeck had charge of a freight train upon defendant's road, which was about to start from the city of Pueblo, in this state, bound north; that this train consisted of thirteen cars of freight, attached to the rear of which was a caboose. The deceased, a young man about twenty-six years of age, was a cripple with an artificial foot and leg. The conductor, who was first introduced as a witness by plaintiff, testified that just previous to the starting of the train from Pueblo he found Shipman on the front platform of the caboose. The deceased accosted him, saying that he was a cripple, and had formerly been a railroad man; that he had a brother living at Greenland, near the line of the road between Pueblo and Denver; and that, as he was disabled from doing any more train work, he wanted to go there, and make his living on a farm. He asked the conductor whether he ever showed favors to crippled railroad men. Chubbeck told him that this depended upon circumstances; that he sometimes did. The deceased then produced a letter showing that he had been a brakeman on another road for 10 or 11 months, and Chubbeck asked him why he did not apply to the Brakemen's Brotherhood for assistance. His reply was that "he had not broke long enough, and that he could not get in." Chubbeck, after examining the letter, told him that he could not carry him. The witness was afterwards asked this question: "Was that all the conversation that took place between you? Answer. No, sir; he asked me if I could carry him, and I told him I could not." Motion for a nonsuit having been interposed and denied at the conclusion of plaintiff's evidence, the conductor was recalled as a witness for the defendant. He was then asked: "What did you tell him as to whether you would carry him? Answer. I told him that I could not do anything for him on the letter; that it would be an impossibility for me to carry him; that the letter was too old." After the conversation at the Pueblo station the conductor went up along the train, and took the numbers of the cars. When he reached the engine he found on the tender a fireman seeking employment.

The regular fireman of the engine had consented to carry this man upon some claim advanced by the latter, and the conductor, finding that he was in the way of the head brakeman, sent this man back to ride in the caboose. The conductor did not return to the rear end of the train till it had left the station, and was well under way. He then found in the caboose, besides the fireman, two or three men traveling with stock on the train, and the deceased. It does not appear that any of the occupants of the car were either provided with transportation, or that any fare was paid to or demanded by the conductor. The train proceeded to Colorado Springs, making but one stop between Pueblo and that point. This stop was made at Fountain, a small way station a short distance below Colorado Springs. The train arrived at Colorado Springs in safety. At this point the Denver, Texas & Gulf Railroad crosses the roadbed of appellant. The train upon which deceased was riding was stopped at this crossing, it being necessary to do some switching in the yards at Colorado Springs. The rear six cars of the train, with the caboose, were cut off just south of this crossing, and left standing upon the track. The evidence shows that at this point the grade declines to the south. Two of these cars were provided with air brakes, and the conductor, in person, set these brakes, and ordered the rear brakeman to set the others. This brakeman testified at the trial that at this time he noticed that the air brakes were not holding, but that he set the hand brakes upon three, or perhaps four, of the freight cars, and another witness testified to seeing him at work setting these brakes. At this point the stockmen and the conductor left the caboose, the deceased and fireman remaining therein. There is some evidence that the latter were quarrelling at the time. The engine, with the other cars, proceeded up the main track to Colorado Springs for the purpose of switching the stock cars on to a stub track. It took perhaps 30 or 40 minutes to do this switching, and then the train was backed down for the cars left south of the crossing. It was then found that these cars were not there. The brakes had in some way been loosened, and the cars had started down the track. The testimony further shows that these cars ran as far as the station of Fountain, where they came in collision with the engine of another train. The cars immediately in front of the caboose were loaded with combustibles,

which were exploded as the result of this collision. Soon thereafter the mangled body of the deceased was found by the side of the track near the place of collision. What became of the fireman does not appear. He was not seen by any witness after the separation of the cars at the crossing near Colorado Springs, and diligent search failed to disclose any trace of him after that time. The theory of the defense was that in a moment of passion he loosened the brakes, and fled.

Charles E. Gast and Horace G. Lunt, for appellant. William Harrison and T. A. McMorris, for appellee.

HAYT, C. J., (after stating the facts.) The statute upon which this judgment is sought to be upheld reads as follows: "Whenever any person shall die from any injury resulting from or occasioned by the negligence, unskillfulness, or criminal intent of any officer, agent, servant, or employe, whilst running, conducting, or managing any locomotive, car, or train of cars or of any driver of any coach or other public conveyance, whilst in charge of the same as a driver, and when any passenger shall die from any injury resulting from or occasioned by any defect or insufficiency in any railroad, or any part thereof, or in any locomotive or car, or in any stagecoach or other public conveyance, the corporation, individual, or individuals in whose employ any such officer, agent, servant, employe, master, pilot, engineer, or driver, shall be at the time such injury is committed, or who owns any such railroad, locomotive, car, stagecoach, or other public conveyance, at the time any such injury is received, and resulting from or occasioned by defect or insufficiency above described, shall forfeit and pay for every person and passenger so injured the sum of not exceeding five thousand (5,000) dollars, and not less than three thousand (3,000) dollars, which may be sued for and recovered." Section 1508, Mills' Ann. St. This section received the careful attention of this court in the case of *Railway Co. v. Farrow*, 6 Colo. 498. The opinion in that case contains a clear and logical analysis of the statute, and the construction there given it has since been followed without question in this state. It was held that the section might be divided, with reference to persons injured, into two parts,—the first giving the right of action to any

person injured by the negligence, unskillfulness or criminal intent of any officer, agent, servant or employe, etc.; the second furnishing a right of action where the death of a passenger resulted from a defect or insufficiency of a railroad locomotive, stagecoach or other public conveyance. Under the foregoing division there is no evidence in this case to sanction a recovery under the first subdivision. The uncontradicted evidence shows that the brakes upon the cars left upon the track were properly set, and it is conclusively shown that if the machinery of the road had been in good order and condition the brakes would have been sufficient to have held the cars for many hours. It is not urged, nor do we think, considering the character of the train, that it was the duty of the defendant, under the circumstances, to leave a brakeman in charge of the cars left south of the Denver, Texas & Gulf crossing. In fact, negligence on the part of any officer, agent, servant or employe of the defendant is not shown. An examination of the complaint, and a review of the trial in the court below, show clearly that the recovery was had upon the theory that the evidence showed conclusively that the deceased was a passenger upon the road of the defendant at the time of the injury, thereby bringing the case under the second subdivision, there being some evidence tending to show a defect in the air brakes. Whether the company had, by its conduct, assumed towards the defendant the duties and obligations due from a common carrier to a passenger was not left to the jury, as a question of fact, to be determined from the evidence, but that such relation resulted from the circumstances appearing in the evidence was assumed by the district judge in his charge to the jury. In our opinion the district court was not warranted in this assumption. The manner in which railway companies conduct their business has been so long followed, with such a degree of uniformity, that the courts are bound to take judicial notice of its general features. Among these may be mentioned the division of their freight and passenger business into two departments, and the separation of their passenger and freight trains. As a general rule, freight is not carried upon passenger trains, and passengers are not carried upon freight trains. Where a person riding upon a passenger train is injured it is a presumption of law that he is entitled to the rights and privileges of a passenger, but this rule does not apply in the case

of a train manifestly designed for the carriage of freight, even if such train does have annexed to it a caboose, as such vehicles are necessary for the accommodation of the employees of the company, and are usually used for this purpose only. The fact that Shipman was found in the caboose attached to the freight train in question was not sufficient, of itself, to warrant the court in assuming that the company had undertaken, as to him, the duties and obligations of a carrier of passengers. In the absence of proof to the contrary the presumption is that he was not a passenger. Not only is this presumption not overcome by the evidence, but it is strengthened thereby. The uncontradicted evidence shows that Shipman applied for passage to the conductor of the train, before the same left the depot at Pueblo; and, while it is true that this application was made for a free ride upon a letter which the deceased exhibited, the conductor testifies that he not only refused to carry him upon the letter, but refused to carry him upon the train. This is the substance of all the evidence in reference to the conversation that took place between the conductor and Shipman at Pueblo, previous to the motion for a nonsuit. The motion should have been sustained by the court. The case, as then made, is not materially aided in this respect by any evidence thereafter introduced.

The fact that the conductor, after discovering Shipman in the caboose, did not eject him, did not constitute the latter a passenger. The evidence shows that the conductor did not discover his presence until the train was well under way, and had proceeded a distance out of the city. The argument that it was the duty of the conductor, under the circumstances, to stop the train, and eject him from the car, cannot be given much weight, in view of the circumstances. The answer to this argument is found in the testimony of that officer, in answer to the following question: "Why did you not stop the train, and put him off? Answer. I just didn't have the heart to do it. I didn't feel disposed to put off a cripple, in the middle of the night, out in the country." If the deceased had been a strong, able-bodied man, traveling in the daytime, it would perhaps have been the conductor's duty to have put him off at the first station; but if, from feelings of humanity, he allowed a cripple to remain on the car, rather than put him off at midnight, certainly the law will not from this forbear-

ance raise the presumption that the deceased was entitled to all the rights of a passenger upon the defendant's train. The real question is as to whether the defendant should be held to have consented to receiving the deceased as a passenger upon its freight train. If the defendant had been in the habit of carrying passengers upon such trains, evidence of this fact should have been produced. To overcome the presumption against such a custom, it is not sufficient that in the present instance there were upon the caboose others besides Shipman. With one exception, they were all men in charge of stock upon the train, and it may be customary for such persons to travel on the same train with the stock, and not for others to do so. As to the fireman, he was on the train at the demand of his brother fireman. In our opinion, the deceased is not shown to have been a passenger at the time of the accident.

A number of well-considered cases will be found supporting this conclusion. In the case of *Eaton v. Railroad Co.*, 57 N. Y. 382, the plaintiff got upon a coal train on the defendant's road, at the invitation of the conductor. To this train no passenger car was attached, but at the end of the train there was a caboose, in which plaintiff was invited to, and did, ride. Through the negligence of the company's employes the train was run into by another, and plaintiff injured. At the trial it was shown that by a regulation of the defendant, printed for the use of employes, passengers were forbidden to ride on coal trains, but of this regulation plaintiff had no actual notice. It did not appear that it was the custom to allow passengers to ride in the caboose. Under these circumstances the trial court instructed the jury that if plaintiff was upon the train with the assent of the conductor, and without being informed of the regulation, then defendant was liable. Upon appeal this instruction was held erroneous, and the liability of the company denied. It was said that there was nothing in the attendant circumstances indicating an apparent authority in the conductor to create between the parties the relation of passenger and carrier. It is further said in this case, in substance, that while the conductor of a passenger train has ample authority to receive passengers upon his train, the conductor of a freight train has no such authority, and that in the case of a stranger riding upon a freight train the presumption would be indulged that he is not legally a passenger, and that to such a person

the company was under no obligations to be careful. In *Elkins v. Railroad Co.*, 3 Fost. (N. H.) 275, the action was for the loss of goods carried on a passenger train. The evidence showed that the conductor of the passenger train had previously carried goods and eggs to market for the same individual. The court held that this was not sufficient to show that the company held itself out as a common carrier of goods by such train; it not appearing that the conductor rendered such service by virtue of any authority derived from the company, or that any compensation was received either by the company or himself. In *Murch v. Corporation*, 9 Fost. (N. H.) 9, it was charged that the injury was occasioned by the failure of the company to furnish safe means of access for passengers upon its freight trains, and the court held that no such obligation rested upon the company; it not being shown that the company made it an habitual business to carry passengers upon its freight trains. In the case of *Railway Co. v. Brooks*, 81 Ill. 245, it was held that no recovery could be had of the railway company for personal injuries to a passenger on its train of cars, or for his death, caused by mere negligence, when such person knowingly and fraudulently induced the conductor to disregard his duty, and defraud the company out of the amount of his fare, for his own profit. In the case of *Railway Company v. Nichols*, 8 Kan. 505, the company was engaged in transporting freight and messengers for the express company. The plaintiff was not in the employ of the express company, but went into the baggage car, with the regular express messenger, for the purpose of learning the route, and assisting the regular messenger with his work. The conductor did not know these facts, but supposed that such person was an express messenger in the employ of the express company, and, acting on this supposition, allowed him to ride without paying his fare. The injury was caused by the baggage car turning over, and the court held that the plaintiff was not a passenger, and not entitled to the rights of a passenger. In the case of *Railroad Company v. Roach*, 83 Va. 375; 5 S. E. Rep. 175, the action was brought by a former fireman of the railroad company, who had accepted the invitation of one of its engineers to ride on the engine with him. The conductor of the train saw him on the engine, and spoke to him there. The plaintiff neither paid any fare, nor had any been demanded of him. The rules of the com-

pany, which every employe was required to learn, prohibited any one but the engineer and certain employes from riding on the engine. It was held that plaintiff was charged with notice of this rule, and that he could not derive any authority from the engineer or conductor for his act; that he was a mere trespasser, and could not recover for injuries sustained. In *Waterbury v. Railroad Co.* 17 Fed. Rep. 671, the plaintiff, a drover having stock in charge, claimed that he was riding on the engine, by the consent of the engineer, to look after his cattle, as was customary. The defendant claimed that it was contrary to orders for anybody other than its employes to ride on the engine. The court held that as to whether defendant had, notwithstanding its rules for the government of its employes, by its conduct, held out its employes to the plaintiff as authorized, under the circumstances to consent to his being carried on the train, should have been submitted to the jury. The court further held that it was a presumption of the law that persons riding upon trains which are palpably not designed for the transportation of passengers are unlawfully there, and that, if it be shown that the consent of the carrier's employes had been obtained to their being there, the presumption is against the authority of employes binding the carriers by such consent. It was said, however, that such presumption may be overthrown by special circumstances; and where the railroad company would derive a benefit from the presence of drovers upon its cattle trains, and may have allowed its employes in charge of such trains to invite, or permit, drovers to accompany the cattle, the presumption against the license to the person thus carried may be overthrown.

An examination of the cases cited as opposed to the conclusion that deceased was not a passenger shows that they are readily distinguishable from the present case. In *Dunn v. Railway Co.*, 58 Me. 187, the injured party, although riding in the caboose of a freight train, contrary to the rules of the company, was treated by the conductor as a passenger, and first-class fare collected from him. In *Cleveland v. Steamboat Co.*, 68 N. Y. 306, the plaintiff was injured before the boat upon which he was a passenger had left its wharf, and before he had an opportunity to pay fare; and the court held that the carrier owed him the duty of a carrier to passengers, although no fare had been paid. In *Jacobus v. Rail.*

way Co., 20 Minn. 125, (Gil. 110,) the plaintiff received a personal injury through the negligence of the defendant's servants in charge of a passenger train, upon which plaintiff was traveling on a free pass; and the court held that the same degree of care was required of defendant as if plaintiff had been a passenger for hire. Here the company had undertaken to carry, and the duty arose from this fact. In *Railroad Co. v. Books*, 57 Pa. St. 339, the plaintiff was a route agent riding upon a passenger train, and the court held that every one upon the car was presumed to be lawfully there as a passenger, having paid, or being liable, when called upon, to pay, his fare, and that the onus is upon the carrier to prove affirmatively that he was a trespasser. The case has no similarity to the one under consideration. In *Creed v. Railroad Co.*, 86 Pa. St. 139, it was held that "where one is traveling by a passenger train, and is not connected with the railroad company, the legal presumption is that he is a passenger, and traveling for a consideration,"—a conclusion which we do not dispute. As to the criticism of Judge Thompson upon the decision in *Eaton v. Railroad Co.*, to be found in his work on *Carriers of Passengers*, at page 344, it is to be observed that the criticism does not apply to the case before us. In that case the company was held not liable for an injury resulting from the gross negligence of its employes, although the injured party was invited to ride by the conductor. Here the deceased was refused passage by the conductor, and the recovery is based upon the claim that he was entitled to the care due a passenger. It not appearing that the deceased was a passenger upon the defendant's freight train, the plaintiff is not entitled to a recovery under the second subdivision of the statute, and the judgment must be reversed.*

1. Carriers—liability for injury to person riding in caboose by invitation of conductor—authority of conductor.—It is not within the apparent scope of the employment of a conductor on a train used exclusively for transporting freight to invite persons to ride on his train; and one who accepts such an invitation, with no intention to pay fare, is not a passenger; and the railroad company is not liable to him for an injury sustained by him in a collision while so riding on the train. *Powers v. Boston & Me. R. Co.*, 153 Mass. 188; 26 N. E. Rep. 446. The fact that the injured person was an old employe of the railroad company, and that some of the conductors had permitted old employes to ride on their freight trains, is not sufficient to establish

*Reported in 83 Pac. Rep. 145.

a custom which would make the company liable to him as a passenger, in the absence of evidence showing that the general officials of the road had notice of the action of the conductors, or that such action had so long continued as to give rise to a presumption of knowledge by these officials. *Ibid.* Even if the injured person was a licensee on the train, the railroad company is not liable for his injuries. *Ibid.*

In an action against a carrier for personal injuries, where it appears that a freight train was forbidden to carry passengers, and the conductor so informed plaintiff, and told him he could not carry him, but a brakeman afterwards told him to get on, and he was injured while the train was being made up, it is error to refuse to charge that, if such were the facts, he cannot recover, and that if the train was forbidden to carry passengers, the conductor could not relax the rule without the consent of the company. *Gulf, C. & S. F. Ry. Co. v. Campbell*, 76 Tex. 174; 13 S. W. Rep. 18.

2. Injury to one knowingly inducing conductor of freight train to violate rules of company by allowing him to ride free.—If a person knowingly induces the conductor of a railway freight train to violate a rule of the company, and to carry him without charge, he is guilty of a fraud on the company, and cannot claim the rights of a passenger. *McVeety v. St. Paul, M. & M. Ry. Co.*, 45 Minn. 268; 47 N. W. Rep. 809. To this proposition the court cites the following: *Railway Co. v. Brooks*, 81 Ill. 245; *Railway Co. v. Biggs*, 85 Ill. 80; *Robertson v. Railway Co.* 22 Barb. 91; *Railway Co. v. Nichols*, 8 Kan. 505; *Prince v. Railway Co.* 64 Tex. 164.

3. Injury to trespasser on freight train—liability of company.—Where a person clandestinely enters a box car of a freight train of a railroad company, to beat his way over the road, he becomes a trespasser on said train, and the only duty the company owes him is not to wantonly injure him. *Hendryx v. Kansas City, etc. R. Co.* 45 Kan. 377; 25 Pac. Rep. 893. To the same effect are the following: *Mitchell v. New York, L. E. & W. R. Co.* 146 U. S. 513; 13 Sup. Ct. Rep. 259; *Egley v. Oregon Ry. & Nav. Co.* 2 Wash. 409; 26 Pac. Rep. 973.

4. Liability for injury to one while attempting to clandestinely board a freight train.—A person who has purchased no ticket and paid no fare, who goes to a caboose attached to a freight train, and, without the knowledge of those in charge of such train, attempts to get into said car at a place where the railroad company is not accustomed to receive passengers, is not a passenger; and, if he is injured in such attempt to board the train, and those in charge of it have no knowledge of his presence, the company is not liable for the injury. *Haase v. Oregon Ry. & Nav. Co.* 19 Or. 354; 24 Pac. Rep. 239.

GERMAN INS. CO. OF FREEPORT v. EDDY. QUEENS INS. CO. OF LIVERPOOL v. SAME. GERMAN FIRE INS. CO. OF PEORIA v. SAME.

(Supreme Court of Nebraska, March 29, 1893.)

1. FIRE INSURANCE. EFFECT OF VALUED POLICY ACT UPON ARBITRATION CLAUSE IN CASE OF TOTAL LOSS. Under the valued policy act of 1889 of Ne-

braska, stipulations in a policy of insurance in conflict with any of the provisions of that act are inoperative, and this applies to a provision, in case of loss, for the appointment of arbitrators. If the property is "totally destroyed," there is nothing to arbitrate.

2. MEANING OF WORDS "TOTALLY DESTROYED" IN VALUED POLICY ACT AS APPLIED TO BUILDINGS. Where all the combustible material in a building is destroyed by fire, although portions of the brick walls are left standing, but are so injured by the fire that they must be torn down, for the purpose of insurance the property is totally destroyed; but, if the person insured should use the brick or other material not destroyed to rebuild, the company would be entitled to the value of such brick or material.

3. Under the issues made by the pleadings, the principal question was whether or not the property had been "totally destroyed," and this question was fairly submitted to the jury, and the verdict is supported by the evidence.

ACTION by Ambrose Eddy against the German Insurance Company of Freeport, Ill., on a fire insurance policy. Same against the Queens Insurance Company of Liverpool, Eng. Same against the German Fire Insurance Company of Peoria, Ill. . The cases were tried as one case, and one record was made, applicable to each of the cases. There was judgment for plaintiff, and, defendants' motion for a new trial being overruled, they bring error.

L. Heiskell, J. R. Wash, Adams & Scott, I. W. Lansing and Chas. Offutt, for plaintiffs in error. Abbott, Selleck & Lane, for defendant in error.

MAXWELL, C. J. The above cases were tried together in the court below, and a verdict rendered in favor of the defendant in error against the German Fire Insurance Company of Peoria, for \$1,824.46, against the Queens Insurance Company for \$1,037.23, and the German Insurance Company of Freeport for \$912.22; all of said verdicts with interest from date of loss. The petition in each case alleges a total loss. The answer admitted the execution of the policies, and the liability of the companies thereon, but alleged, in avoidance, that the policies provided that, "in the event of a disagreement as to the amount of loss, the same shall be ascertained by two competent and disinterested appraisers, the assured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; and the award in writing of any two shall determine the amount of

such loss." And the said policies each further provided that "no suit or action on this policy shall be sustainable in any court of law or equity until after full compliance by the assured with all the foregoing requirements." That there was "disagreement as to the amount of loss," and a demand by the insurance companies, in due time, that the question as to the amount of loss be submitted to arbitrators. That the demand was acceded to on July 3, 1890, and an arbitrator selected by each party on that day, and that therefore, the actions were prematurely brought, they having been instituted while the arbitrators were acting, and before they made an award, and that on September 12, 1890, two of the arbitrators made an award fixing the amount of loss at \$1,500, and no more. The reply is as follows: "That he denies each and every allegation in said answer contained except as hereinafter specifically admitted. He admits that on the 3d day of July, 1890, there was an agreement by and between the parties hereto that the amount of the loss sustained by the plaintiff in said fire should be submitted to arbitration, as provided in the policy herein sued on; that the plaintiff chose the said Royer and the defendant chose the said Harte to act in the said arbitration. Plaintiff further alleges that from that time he and the one he so chose, the said Royer, used their best efforts to have the said appraisal and arbitration made as provided in the said policy, but alleges that they were not able to get the said Harte to act with them, and alleges that the said Harte neglected and refused to act in said arbitration for more than the space of 30 days thereafter, although often requested so to do. That by reason of the refusal of the said Harte to act in said arbitration, and the failure of the said Harte and the said Royer to make any appraisal of the said loss in said fire for more than the space of 30 days, the said loss was never arbitrated and determined under the said policy, and in accordance with the provisions therein contained, and that after having waited for more than 30 days after the said Harte and Royer had been chosen as herein set forth, and they having failed in any way to act upon said loss, or to set a time when they would act thereon, plaintiff commenced this suit. That after the suit herein was begun the said defendant came to the plaintiff, and requested that the whole of the matters in dispute involved in said loss and in the suit might be submitted to the said Harte and the said

Royer, and to one to be selected by them, who should act in case of their disagreement. That at that time, to wit, on the 21st day of August, 1890, it was agreed between the parties herein that said arbitration should take place on that day, to wit, on the 21st day of August, 1890. That in pursuance of the said agreement, and not under the stipulations of the policy, the said Harte and the said Royer agreed upon the said Gray to act with them in the said arbitration. That, after the said Gray had been so chosen, then the said Harte refused to act with the said Royer, and appraise the said loss, in accordance with the said agreement, and the said Harte neglected, failed and refused to in any way go on with the said appraisal and arbitration, and said Harte never did act, or try to act, with said Royer under said agreement. That afterwards he learned, and now alleges the fact to be, that the said Harte was not a disinterested party, but that he was in the employment of the defendant, and was and is prejudiced in its favor, and against this plaintiff, and was not a proper person to choose for an arbitrator under the said policy, whereby and because of the failure of the said Harte, Royer, and Gray to act in accordance with the terms of the said agreement under which they were chosen, and because plaintiff had learned of the prejudice of the said Harte as herein alleged, the said last-mentioned agreement became null and void, and the plaintiff thereafter notified the defendant that he withdrew from all further attempts at an arbitration of the said loss, and that he should proceed at once to clear away the rubbish and ruins of the said fire, and to rebuild the house. That it was long after the said notice to the defendant, and after he had proceeded and cleared away the ruins from the said fire, that the said Harte and the said Gray made their pretended appraisal and award of the loss incurred by the said fire, and that, when the said Harte and the said Gray made their pretended award, there was no property there for them to view. That said loss has never been arbitrated, or in any manner settled, either under or by virtue of the terms of the said policy, or by virtue of any agreement by and between the parties herein."

The first error relied upon is that the verdict is not sustained by sufficient evidence. The ground upon which this claim is made is that the proof fails to show a total loss of the property.

In 1889 an act was passed as follows, (section 43, c. 43, Comp. St.): "Whenever any policy of insurance shall be written to insure any real property in this state against loss by fire, tornado, or lightning, and the property insured shall be wholly destroyed, without criminal fault on the part of the insured or assigns, the amount of the insurance written in such policy shall be taken conclusively to be the true value of the property insured, and the true amount of loss and measure of damages. Sec. 44. This act shall apply to all policies of insurance hereafter made or written upon real property in this state, and also to the renewal which shall hereafter be made of all policies heretofore written in this state, and the contracts made by such policies and renewals shall be construed to be contracts made under the laws of this state." What is the meaning of the words "wholly destroyed," when applied to a building? If the building was constructed of brick or other noncombustible material, fire could not destroy that. Therefore the brick or other material not destroyed would have some value, which the party retaining should pay for. From the nature of the case, therefore, the words referred to do not mean the debris from a building destroyed. This may have some value, and, if so, the insurance company, if it pays the loss, is entitled to compensation therefor. The words, when applied to a building, mean totally destroyed as a building, that is, that the walls, although standing, are unsafe to use for the purpose of rebuilding, and must be torn down and a new building erected throughout. *Seyk v. Insurance Co. (Wis.)* 41 N. W. Rep. 443. In the case cited it is said: "The evidence is that all the combustible material in the structures was destroyed, and, although portions of the brick walls were left standing, yet they were useless as walls, and many—perhaps most—of the bricks therein were spoiled by the heat. It cannot be doubted that the identity and specific character of the insured buildings were destroyed by the fire, although there was not an absolute extinction of all the parts thereof. This was an entire destruction of the buildings, within the meaning of the statute. 1 Wood. Ins. § 107." There is abundant proof in the record that such was the situation of the building in the case at bar after the fire.

2. Where there is a total loss the provision for arbitration, except it may be to ascertain the value of the debris, does not apply.

The provisions of the statute override any stipulations in the policy to that effect, as an insurance company can only do business in the state on the conditions provided by law. If the property was totally destroyed, therefore, stipulations in the policy as to arbitration must yield to the statute. *Insurance Co. v. Leslie*, (Ohio Sup.) 24 N. E. Rep. 1072; *Seyk v. Insurance Co.*, (Wis.) 41 N. W. Rep. 443. The jury brought in a verdict for a small sum less than the amount of the policy in each case, having evidently deducted the value of the brick and other material left from the burned building. Of this the companies have no cause to complain.

3. The question whether or not the building was wholly destroyed is one of fact, and it seems to have been fairly submitted to the jury. It is unnecessary to review the instructions. There is no material error in the record, and the judgment is affirmed. The other judges concur.*

Statutory regulation of insurance contracts—valued policy acts.
—A statute of Ohio passed in 1879, and afterwards incorporated into the revised statutes of 1880, as section 3643, provided as follows: “Any person, company, or association hereafter insuring any building or structure against loss or damage by fire or lightning, by a renewal of a policy heretofore issued, or otherwise, shall cause such building or structure to be examined by an agent of the insurer, and full description thereof to be made, and the insurable value thereof to be fixed by such agent. In the absence of any change increasing the risk, without the consent of the insurers, and also of intentional fraud on the part of the insured, in case of a total loss, the whole amount mentioned in the policy or renewal upon which the insurers receive a premium, shall be paid; in case of a partial loss, the full amount of the partial loss shall be paid; and, in case there are two or more policies upon the property, each policy shall contribute to the payment of the whole or the partial loss in proportion to the amount of insurance mentioned in each policy. But in no case shall the insurer be required to pay more than the amount mentioned in its policy.” In a suit upon a policy issued upon a frame building for \$700, which had been totally destroyed, the defenses were made that no award had been made by arbitrators fixing the amount of the loss as required by the policy, that the insured had falsely represented and warranted that the building was of the value of \$1,000 when in fact it was worth only \$250, and that the insured falsely represented and warranted that the building was occupied as a dwelling and store when it was in fact unoccupied, in violation of the conditions of the policy. A judgment for the plaintiff was sustained and the points decided are thus stated in a syllabus prepared by the court:

*Reported in 54 N. W. Rep. 856.

(1.) The act of March 5, 1879, "to regulate contracts of insurance of buildings and structures" (now sections 3643 and 3644 of the Revised Statutes), applies to all policies issued since it went into effect, insuring any building or structure in this state against loss or damage by fire. The neglect or omission of the agent to make the examination of the property, and fix its insurable value, as the statute requires, cannot prevent its application to a policy issued by the company, or defeat or affect the operation of the statute.

(2.) The statute is founded upon considerations of public policy; its purpose being to exact diligence and care on the part of insurance companies to avoid improper risks and overinsurance, by requiring them to cause their agents to make personal examination of the property, a full description thereof, and fix its insurable value as well as to protect the insured against unreasonable forfeitures and defenses. The more effectually to accomplish these results, the statute holds the company liable on its policy unless, after its issue, a change occurs, increasing the risk, without its consent, or the insured has been guilty of intentional fraud; and, in case of the total loss of the property by fire, the measure of the liability is fixed at the amount mentioned in the policy, upon which the insurer received a premium. The statute cannot be regarded as conferring upon the assured a mere personal privilege, which may be waived by agreement. It moulds the obligation of the contract into conformity with its provisions, and establishes the rule and measure of the insurer's liability.

(3.) Conditions of the policy providing for a different rule or measure of liability, being in conflict with the statute, are without any binding force. Of this character are stipulations to the effect that the amount of loss or damage shall be estimated according to the actual value of the property at the time of the fire, and not more than it would cost the insurer or insured to restore the same, and that no action on the policy shall be commenced until an award of arbitrators, chosen for that purpose, shall be obtained.

(4.) Where there has been no intentional fraud on the part of the insured, a condition or situation of the property at the time of the insurance, which the examination the agent is required by the statute to make should have reasonably discovered, cannot avail to defeat a recovery on the policy; nor, in such case, if the loss be total, is it competent for the insurer to prove that the value of the property is less than the amount mentioned in the policy. And statements in the application concerning such condition or value are immaterial, and cannot be fraudulent. *Queens Ins. Co. v. Leslie*, 47 Ohio St. 409; 24 N. E. Rep. 1072.

The following cases, construing similar statutes, are reviewed in the opinion: *White v. Insurance Co.*, 4 Dill. 177; *Wall v. Society*, 32 Fed. Rep. 273; *Chamberlain v. Insurance Co.*, 55 N. H. 249; *Thompson v. Insurance Co.*, 45 Wis. 388; *Bammessel v. Insurance Co.*, 43 Wis. 463; *Cayon v. Insurance Co.*, 68 Wis. 510; *Oshkosh Gas Light Co. v. Germania Fire Ins. Co.*, 71 Wis. 454; *Emery v. Insurance Co.*, 52 Me. 323.

UNION FREIGHT R. CO. v. WINKLEY ET AL.

(Supreme Judicial Court of Massachusetts, May 19, 1893.)

1. CARRIERS. WHO LIABLE FOR FREIGHT CHARGES. CONSIGNOR OR CONSIGNEE? When the vendor of goods delivers them to a railroad to be carried to the purchaser, though the title may pass to the purchaser by such delivery, and the name and address of the consignee, who is the purchaser, may be known to the company, the vendor is presumed to make the contract for transportation on his own behalf, and is liable for the freight, but such presumption may be rebutted by evidence showing that it was understood that the consignee should pay the freight.

2. An employe of defendants, who had sold ice to one H., told the agent of a railroad company that there was a car to go to him, without further instructions. The company billed the car to H. via connecting carriers. No bill or receipt was given defendants, and the freight charges were made to H. by all the carriers, and bills for freight sent to him. Held sufficient to show that it was understood that H., and not defendants, should pay the freight.

ACTION by the Union Freight Railroad Company against John N. Winkley and others to recover freight charges. Judgment was ordered for defendants, and plaintiff appeals.

It appeared from an agreed statement of facts that plaintiff, at the occurrence of the events hereinafter mentioned, and for a long time previous, was a common carrier, having its usual place of business in Boston, and operating a railroad between the stations of the various railroads, including those hereinafter mentioned, which have their terminal points in Boston; that the defendants were copartners dealing in ice under the name of Winkley & Maddox, having a usual place of business in Boston, and in the year 1890 having part of their stock stored in ice houses on the shore of Smith's pond, in the town of Wolfborough, in the state of New Hampshire; that the defendants sold to N. M. Merrick, of Plympton, in this commonwealth, in August, 1890, a car load of ice at a price per ton delivered on the cars; that there was a side track (constructed on private lands by parties interested in the ice trade) from a railway operated by the Boston & Maine Railroad, running alongside of the ice houses of the defendants, upon which track cars were pushed up by the Boston & Maine Railroad Company, and left to be loaded; that the defendant's servants loaded

the said ice in a car thus left on said side track ; that one of the defendants' servants informed the station agent at a station of said railroad company about two miles distant that there was at the ice houses of Winkley & Maddox, at the pond, a car of ice for N. M. Merrick, Plympton, Mass., giving the number of the car, and giving no other instruction or direction ; that no other information concerning the destination of the car was at any time given the Boston & Maine Railroad Company ; that said company way-billed the said car to N. M. Merrick, Plympton, Mass., via the Old Colony Railroad Company, billed the freight charges to N. M. Merrick, hauled the car to Boston, and delivered it to the Union Freight Railroad Company to be hauled to the Old Colony Railroad Company ; that the Union Freight Railroad Company hauled said car from the freight yard of the Boston & Maine Railroad to that of the Old Colony Railroad Company, and delivered it to the latter company, paying to the Boston & Maine Railroad Company its freight charges, and taking its said bill to N. M. Merrick, so paid and receipted ; that the Old Colony Railroad Company paid to said Union Freight Railroad Company the amount of the bill so paid to the Boston & Maine Railroad Company, and its own (the Union Freight Railroad Company's) charges to said N. M. Merrick for its freight ; that the Old Colony Railroad Company billed these charges, plus its own charges for transportation from Boston to Plympton, to said N. M. Merrick, sending to said Merrick the said bills for freight, and delivered the said ice to said Merrick at Plympton. Neither said Merrick nor any one else has paid said freight charges. The defendants thereafter claimed payment for said car of ice from Merrick, but payment has not been made.

C. F. Choate, Jr., for appellant. *Lund, Jewell & Welch*, for appellees.

FIELD, C. J. The plaintiff is the second in a line of three connecting railroads over which the ice was transported, and the freight due to the first two roads has been paid by the last. We assume; without deciding it, that the right of the plaintiff to maintain this action is the same as if it were the first road, and the freight had not been paid. With whom, then, did the Bos-

ton & Maine Railroad make the contract for transportation, and who promised that company to pay the freight? There was no express contract. The defendants, through their servants, might have contracted with the railroad to pay the freight, although, as between themselves and Merrick, he was bound to pay it, but they made no such contract in terms. A consignor of merchandise delivered to a railroad for transportation may be the owner, and act for himself, or may be an agent for the owner, and act for him, and this may or may not be known to the railroad company. In the present case the railroad company knew the name and residence of the consignee. From the agreed facts it appears that the title to the ice passed to Merrick when it was put on board the car, and that it was transported at his risk. The doctrine of the courts of the United States seems to be that the property in goods shipped is presumably in the consignee, although this presumption may be rebutted by proof. *Lawrence v. Minturn*, 17 How. 100; *Blum v. The Caddo*, 1 Woods, 64. In *Dicey on Parties to Actions* (pages 87, 88), the result of the English decisions is stated to be as follows: "The contract for carriage is, in the absence of any express agreement, presumed to be between the carrier and the person at whose risk the goods are carried, i. e., the person whose goods they are, and who would suffer if the goods were lost. * * * When, therefore, goods are sent to a person who has purchased them, or are shipped under a bill of lading by a person's order, and on his account, the consignee, as being the person at whose risk the goods are, is considered the person with whom the contract is made. He is liable to pay for the carriage, and is the proper person to sue the carrier for a breach of contract." And, (*Id.* page 90, note:) "When the consignor acts as agent of the consignee, but contracts in his own name, it would appear that either the consignor or consignee may sue." *Dawes v. Peck*, 8 Term R. 330; *Domett v. Beckford*, 5 Barn. & Adol. 522; *Coombs v. Railway Co.* 3 Hurl. & N. 1; *Sargent v. Morris*, 3 Barn. & Ald. 277; *Dunlop v. Lambert*, 6 Clark & F. 600; *Railway Co. v. Bagge*, 15 Q. B. Div. 625; *Cork Distilleries Co. v. Great Southern & W. Ry. Co.*, L. R. 7 H. L. 269. The cases generally are collected in *Hutch. Carr.* § 448 *et seq.*; *Id.*, § 720 *et seq.* Most of the English cases were reviewed in *Blanchard v. Page*, 8

Gray, 281. That was a case of the carriage of goods by sea under a bill of lading, and it was held that the bill of lading was a contract between the shipper and the shipowner, and that although it was shown that the shipper acted as agent of the consignees, who had bought and paid for the goods before shipment, yet he could bring an action in his own name for breach of the contract of carriage, unless he was prohibited by his principal, and it was said that he would be liable for the freight. In *Wooster v. Tarr*, 8 Allen, 270, it was decided that under a bill of lading in the usual form the shipper was liable to the carrier for the freight, although the bill contained the usual clause that the goods were to be delivered to the consignee or their assignees, "he or they paying freight for said goods," etc. It was said "to be the settled doctrine that a bill of lading is a written simple contract between a shipper of goods and the shipowner; the latter to carry the goods, and the former to pay the stipulated compensation when the service is performed." Both these cases were upon express contracts.

The strongest case for the plaintiff is *Finn v. Railroad Co.* 102 Mass. 283, which was upon an implied contract. In that case one Clark had ordered shingles of Finn, who shipped them on his own account, under a bill of lading, on board a canal boat, to be delivered to "the Great Western Railroad Company, or their assignees, at Greenbush, N. Y. Consignee to pay freight on the delivery." And the shingles arrived by boat at the freight station of the railroad company at Greenbush, N. Y. The shingles were described in the bill of lading as marked, "J. S. C. Extra," or "J. S. C." They were burned, while in the freight house, by an accidental fire. They were intended to be transported to Joseph S. Clark, Southampton, Mass. Clark accepted and paid a draft drawn by Finn for the shingles; and, in a suit by Finn against him, Clark pleaded the amount of the draft in set-off, and recovered the amount, on the ground that "the omission of the plaintiff, Finn, to forward the goods with proper directions to the consignee and the place of delivery authorized the defendant, Clark, to treat the alleged sale as one never perfected, and to recover back the money paid upon the draft." *Finn v. Clark*, 10 Allen, 479; 12 Allen, 522. Finn then brought suit against the railroad company for its failure to

forward and deliver the shingles to Clark. It was held that although the case of Finn against Clark settled the fact that, as between them, the title to the property remained in Finn, yet the railroad company, not being a party to that suit, could not set up the judgment in it "as an estoppel against Finn upon the question of" delivery. Finn v. Railroad, 102 Mass. 283. At the second trial the plaintiff obtained a verdict, and the facts stated in the exceptions showed "that the title to the property had passed to Clark before the loss occurred, leaving Finn, at most, only right of stoppage in transitu;" and it was in this aspect of the case that the opinion in 112 Mass. 524 was delivered. The contention of the plaintiff was that the shingles had been delivered to the railroad company with proper directions for their transportation, and that the defendant had neglected to transport them, whereby they had been burned. In the opinion the court say of the liability of a common carrier that "*prima facie* his contract of service is with the party from whom, directly or indirectly, he receives the goods for carriage; that is, with the consignor.

* * * When carrying goods from seller to purchaser, if there is nothing in the relations of the several parties except what arises from the fact that the seller commits the goods to the carrier as the ordinary and convenient mode of transmission and delivery, in execution of the order or agreement of sale, the employment is by the seller, the contract of service is with him, and actions based upon the contract may, if they must not necessarily, be in the name of the consignor. If, however, the purchaser designates the carrier, making him his agent to receive and transmit goods, or if sale is complete before delivery to the carrier, and the seller is made the agent of the purchaser in respect to the forwarding of them, a different implication would arise, and the contract of service might be held to be with the purchaser." Although this was not a suit to recover freight, the principles on which it was decided are applicable to such a suit, and the effect of this and the previous decisions, we think, is that in this commonwealth, when the vendor of goods delivers them to a railroad to be carried to the purchaser, although the title passes to the purchaser by the delivery to the railroad company, and the name and address of the consignee, who is the purchaser, is known to the company, the vendor is presumed to make the con-

tract for transportation with the company on his own behalf, and is held liable to the company for the payment of the freight. This presumption, however, is a disputable one, and may be rebutted or disproved by evidence; and if the vendee has ordered the goods to be sent at his risk, and on his account, he also may be held liable as the real principal in the contract. See *Byington v. Simpson*, 134 Mass. 169. But, whether the presumption be one way or the other, it is a matter of inference from the particular circumstances of the case, and the question which is always to be considered is the understanding of the parties. See *Railroad v. Whitcher*, 1 Allen, 497. In the present case there was no bill of lading or receipt signed by the railroad company, and accepted by the defendants. There was a waybill, but it does not appear that the names of the defendants were in it. The freight charges were made in every instance to Merrick, the consignee, and the bills for freight were sent to him. These facts, and perhaps some others stated in the agreed facts, afford some evidence that the railroad company understood that Merrick was to pay the freight to the company. Upon an agreed statement of facts this court cannot draw inferences of fact, unless they are necessary inferences. *Railroad v. Wilder*, 137 Mass. 536. The agreed facts in this case, we think, contain some evidence that the understanding of all the parties was that Merrick should pay the freight to the railroad company; and we cannot hold, as matter of law, that the defendants made a contract on their own behalf to pay the freight. Judgment affirmed.*

Carriers—liability of consignor for the freight.—Hutchinson says that the consignee is presumptively the owner of the goods and *prima facie* liable for the freight. Hutch. Carr. § 448. But the carrier may hold the consignor for the freight, unless estopped by his agreement or conduct. Ibid., § 451.

WADSWORTH v. UNION PAC. RY. CO.

(Supreme Court of Colorado, May 29, 1898.)

1. RAILROAD COMPANIES. STOCK-KILLING STATUTE. QUESTIONS OF PRACTICE. Where the court announced that a new trial should be allowed, and plaintiff then declared that he elected to stand by his case as made, and there-

* Reported in 84 N. E. Rep. 91.

upon the court dismissed the action, held, that the circumstances showed that all parties intended to treat the case as though the court had dismissed the action or granted a nonsuit on the ground that plaintiff had failed to "prove a sufficient case for the jury," and the ends of justice will be subserved by the court of review treating the case according to the intention of the parties.

2. **WHEN CASE SHOULD BE SUBMITTED TO JURY.** Where the evidence is conflicting, or of such a character that different conclusions may be reasonably drawn therefrom, the case presents a question of fact for the jury under proper instructions.

3. **GROUND OF DECISION OF LOWER COURT IMMATERIAL WHEN ITS JUDGMENT IS CORRECT.** Though the dismissal of an action may not be warranted on the ground stated in the judgment order, yet, if the record discloses other grounds which, as a matter of law, show that plaintiff was not entitled in any event to recover in the action, a judgment of dismissal may be upheld.

4. **VALIDITY OF STATUTE RENDERING COMPANY LIABLE FOR INJURIES TO STOCK IRRESPECTIVE OF NEGLIGENCE OR BREACH OF DUTY.** A statute which renders a railroad company absolutely liable for stock killed or injured by the operation of its cars or engines, irrespective of negligence or the breach of any duty imposed by law for the prevention of such results, and without affording the company any opportunity to be heard on the question of amount of liability, is unconstitutional and void, as denying such company the equal protection of the laws and depriving it of its property without due process of law.

5. **INVALIDITY OF STATUTE MUST BE CLEAR TO JUSTIFY COURT IN DECLARING IT VOID.** A legislative act, within the sphere of legislative power, and not an encroachment upon the province of some other department of the government, will be upheld, unless clearly in conflict with some provision of the constitution of the state or nation, or in violation of some private right thereby secured.

6. **WHEN INVALIDITY OF PART, INVALIDATES THE WHOLE STATUTE.** Where the sections of a statute must be construed together as dependent, and not as independent, provisions, the invalidity of one part invalidates other parts.

THIS action was founded upon chapter 93, Gen. St. 1883, as amended by the act of 1885. Section 13 and amended sections 14 and 15 are as follows:

"Sec. 13. That every railroad or railway corporation or company operating any line of railroad or railway, or any branch thereof, within the limits of this state, which shall damage or kill any horse, mare, gelding, filly, jack, jenny, or mule, or any cow, heifer, bull, ox, steer, or calf, or any other domestic animal, by running any engine or engines, car or cars, over or against any such animal, shall be liable to the owner of such animal for the damages sustained by such owner by reason thereof.

"Sec. 14. If the owner of any animal or animals so killed, or his or her authorized agent, shall make affidavit before some offi-

cer authorized to administer oaths that he or she was the owner or authorized agent of the owner, of the recorded brand found upon the animal or animals so killed or damaged at the time of such killing or damaging, and such persons shall, within six months after such killing or damaging, deliver such affidavit to the agent or any officer of such company or corporation, together with a certificate of his or her mark or brand, under official seal of any officer authorized by law to record such mark or brands, or shall make affidavit that the animal killed or damaged, as aforesaid, had no recorded mark or brand, and that he or she is the owner of such animal, describing it, and the corporation or company shall pay to such person delivering such affidavit and certificate, or such affidavit last aforesaid, as follows: Schedule. For American sheep, each, two dollars and fifty cents, (\$2.50); for Mexican sheep and goats, one dollar and fifty cents, (\$1.50); for Texas cattle, yearlings, twelve dollars, (\$12.00); for Texas cattle, two years old, seventeen dollars, (\$17.00); for Texas cattle, three years old, steers and cows, twenty dollars, (\$20.00); for Texas cattle, four years old, steers or over, twenty-five dollars, (\$25.00); for American yearlings, fifteen dollars, (\$15.00); for American, two years old, twenty dollars, (\$20.00); for American, three years old, steers and cows of all ages, twenty-eight dollars, (\$28); for American, four years old steers and over, thirty-four dollars, (\$34); for calves, ten dollars, (\$10.) The above price, when paid, shall be payment in full. All Texas and Mexican cattle shall be considered as Texas cattle, and half-bloods shall be classed as American cattle. Thoroughbred cattle, milch cows, high-grade American cattle and grade bulls shall be paid for at their cash value. Thoroughbred sheep shall be paid for at their cash value; horses, mules and asses shall be paid for at their cash value; provided, that no railroad company shall at any time be required to pay more than the market value of any animal killed or damaged, except as hereinafter provided. In all cases where such railroad company or corporation shall kill any of the stock mentioned in this act, and for which no price or sum is fixed, the owner or agent of such stock shall, after the filing, as aforesaid, of an affidavit and certificate of brand or affidavit of ownership, which affidavit

shall contain a statement of class, grade, and value of such animal or animals, select some disinterested freeholder of the county where such killing took place, and shall notify such company or corporation of said selection, and such company or corporation shall, within three days thereafter, select some suitable person to act with person so selected, and the two so selected shall select a third, and the three so selected shall, without delay, proceed to appraise the value of the stock so killed or damaged, a majority of which three appraisers shall be sufficient to determine the same; and shall certify, under oath, such appraisalment to an agent or superintendent of such company or corporation. In case such railroad or corporation shall refuse or neglect to appoint such appraiser, it shall be the duty of the justice of the peace nearest to the place where such stock was so killed or damaged to select three disinterested persons as appraisers, and administer to them an oath to honestly appraise the value of such stock, which appraisers shall, without delay, appraise and forward to such justice the result of such appraisalment, which justice shall, within ten days thereafter, forward to an agent or superintendent of such railroad or corporation, a certificate of the result of such appraisalment and the costs thereof; and such railroad or corporation shall, within thirty days after the receipt of such certificate, pay to the owner of the stock so killed or damaged, or to his or her authorized agent, the amount of such appraisalment, together with all the costs, as aforesaid; and in all cases where the value of such stock is established by this act, such company or corporation shall pay for such stock within thirty days after the delivery of the affidavit and certificate of ownership of brand, or affidavit of ownership of said stock, and if any such company shall so fail to pay for such stock within thirty days after the delivery of such affidavit and certificate, such company shall be liable for double the value the appraised or schedule value of any such animal or animals, together with reasonable attorneys' fees, to be allowed by the court; and all persons selected or appointed under this section shall receive the sum of one dollar, to be paid by said railroad company or corporation, as hereinbefore provided; provided that any railroad company having fenced its line of road, or any part thereof, or who may hereafter fence its road, or any

part thereof, with a good and lawful fence, and put in good and sufficient cattle guards, and have put in gateways upon and across their said railroad, at the request of persons holding or owning land adjacent to said railroad, for the private use and accommodation of said adjacent owners or holders of land, said railroad company shall not be held liable for the killing or injury of any stock getting through said gateways, belonging to said party at whose request and for whose accommodation said gateway was made, unless such killing or injury was occasioned by the fault or negligence of said railroad company or its employes.

"Sec. 15. Every railroad company shall keep a book at the county seat of each county through which their road runs; provided that said road runs or passes through the county seat. If such railroad does not pass through the county seat, then such book shall be kept at the principal town in the county through which it passes; and it is hereby made the duty of the said company to cause to be entered in said book, within fifteen days after the killing of any animal, a description, as nearly as may be, of such animal, its color, age, marks and brands, and shall keep said book subject to the inspection of persons claiming to have had animals killed. Should any company fail to keep said book, or to file such notice, in the manner herein provided, or to enter therein such description of any animal killed, for a period of fifteen days thereafter, such company shall be liable to the owner of such animal to an amount twice the full value thereof." Gen. St. 1883, p. 814; Sess. Laws, 1885, pp. 304, 338.

Wadsworth was plaintiff below. The Union Pacific Railway Company was defendant. At the October term, 1887, the cause was tried by a jury, and verdict rendered in plaintiff's favor. A motion for a new trial was interposed by defendant, and at a subsequent term the following proceedings were had and entered of record: "And afterwards, and on the 25th day of April, 1888, the same being one of the regular juridicial days of the April, 1888, term of the said court, the motion for new trial aforesaid having been continued for further hearing to said last named term, and having been argued in chambers meanwhile in vacation, and now coming on for final hearing and determination, and the court, being of the opinion that said motion should be allowed, but plaintiff electing to stand by his case as made, doth order and

adjudge that, there being no evidence that defendant's engine or cars ran over or against the horse of plaintiff herein in question, said animal, upon the contrary, appearing to have run into or against the moving train of defendant's cars, this action of plaintiff, under the statutes counted upon therein, does not lie, and the same, the evidence, and the verdict herein, notwithstanding, is dismissed at the costs of the plaintiff." The plaintiff seeks a reversal of this judgment by writ of error.

Bailey & Wilkin, for plaintiff in error. *Teller & Orahood* and *C. M. Kendall*, for defendant in error.

ELLIOTT, J. (after stating the facts.) The dismissal of the action, as shown by the record, is assigned for error.

1. The dismissal was somewhat irregular, but it is not difficult to understand its meaning. The cause had been tried by jury, resulting in a verdict in plaintiff's favor, finding that the value of the horse killed was \$200, and assessing plaintiff's damages at \$400 on each of the two causes of action. Upon consideration of defendant's motion for a new trial, the court was of opinion that it should be allowed, and so announced its conclusion. Thereupon plaintiff declared that he elected to stand by his case as already made, and the district court then and there dismissed the action at plaintiff's costs. The declaration of plaintiff was equivalent to saying that he could not prove any better case, and that he desired to obviate the necessity for another trial. The bringing of the whole record to this court for review, including the bill of exceptions, containing "all the testimony offered, given or received on the trial," clearly indicates that the intention of the parties was to treat the action of the court as though the court had dismissed the action or granted a nonsuit on the ground that plaintiff had failed to "prove a sufficient case for the jury." That such was the understanding and intention of plaintiff as well as the defendant, is confirmed by the fact that the assignments of error and argument of counsel in this court extend to the conclusions of the trial court upon the evidence, the pleadings and the statutes upon which the action is founded.

2. The Code of Civil Procedure contemplates that the substance, and not the mere form, of judicial proceedings shall be

regarded in determining the rights of parties; hence we shall review this cause according to the intention of the parties, as above stated, since it is obvious that the ends of justice will be thereby accomplished. Code, § 78, also section 443; *Railway Co. v. Chandler*, 8 Colo. 376, 8 Pac. Rep. 571; *Town of Idaho Springs v. Filteau*, 10 Colo. 105, 14 Pac. Rep. 48.

3. Upon a careful examination of the evidence we are of the opinion that the court would not have been justified at the close of the evidence in dismissing the action or in granting a nonsuit on the ground that there was no evidence tending to prove that defendant's engine or cars ran over or against the plaintiff's horse, as stated in the finding of the court. The evidence on that phase of the case was somewhat conflicting, or of such a character that different conclusions might have been reasonably drawn therefrom; and so the evidence did not present a question of law for the court, but one of fact for the jury under proper instructions. 2 *Thomp. Trials*, § 2242 *et seq.*; *Lord v. Refining Co.*, 12 Colo. 394, 21 Pac. Rep. 148; *Denny v. Williams*, 5 Allen, 1-5.

4. But it is contended that, though the grounds for dismissing the action, as stated in the court's finding, are not sufficient in law, yet the judgment of dismissal should be upheld, since the record discloses other facts which, as a matter of law, show that plaintiff was not entitled, in any event, to recover in the action.

5. The complaint contains two causes of action. Each count is founded upon certain provisions of the statute relating to stock killed by the operation of railroads. The killing occurred in June, 1886; hence we must consider the law as it existed at that time. See Gen. St. 883, c. 93, § 2804 *et seq.* Also acts amendatory thereof,—Sess. Laws 1885, pp. 304, 338. Neither count of the complaint alleges any negligence on the part of the defendant company in respect to the killing of plaintiff's horse. Prior to the act of 1885, above cited, it was provided by statute that any railroad company operating its road within this state which should damage or kill any domestic animal by running any of its engines or cars over or against such animal should be liable to the owner of such animal for the damages thereby occasioned. The statute contained a fixed schedule of prices to be paid for certain kinds of animals so killed. It is also provided for an appraisement of the value of the animals for which no schedule price was

fixed, but the appraisement was required to be made without any trial in court, and no proof of negligence on the part of the railway company was required in order to establish its liability. By the act of 1885 an amendment to section 14 was added, relating to fences, cattle guards, and gateways, by which it was provided that under certain circumstances a railroad company should not be held liable for the killing or injury of any stock, unless such killing or injury was occasioned by the fault or negligence of the company or its employees. This peculiar proviso was again amended in 1891 (Sess. Laws, p. 281), but the amendment was too late to affect this case. The first count of the complaint contains an averment to the effect that defendant's railway line, at the place where plaintiff's horse was killed, was not then and there fenced with a good and lawful fence, or with any fence whatever; also a further averment that "said railway line, at the point thereon of said killing, was not fenced as by said statute advised." These averments were not sufficient, under the act of 1885. According to the terms of that act, before plaintiff could claim that the defendant company owed him any duty in respect to fencing its railway, it was necessary for him to allege that he was the owner or holder of land adjacent to such railway; that he had requested defendant to fence its railroad, put in cattle guards and gateways; and that his horse was killed by reason of defendant's neglect to comply with such request. The complaint does not contain such allegations. Moreover, according to the strict terms of the proviso, the company could not, even by fencing, putting in cattle guards and gateways, exempt itself from the unconditional liability otherwise imposed by the statute, except as against the party requesting the gateway to be made. From the foregoing it follows that, in order to warrant a recovery for plaintiff under the first count of his complaint, as the statute existed when the first alleged cause of action arose, it must be held, unconditionally, that if any railroad company operating its road in this state should damage or kill a domestic animal by running its engines or cars over or against such animal, the railroad company would be liable therefor, irrespective of any act of negligence on the part of such company. If such statute were valid, then, according to its literal terms plaintiff's right to recover must be upheld.

6. Counsel for plaintiff rely upon the case of *Railway Co. v. De Busk*, 12 Colo. 294, 20 Pac. Rep. 752, as sustaining the stock-killing statute as it existed under the act of 1885. In that case a statute declaring that every railroad company shall be liable for all damages by fire that is set out or caused by operating its road, in this state, was upheld as constitutional, the court holding that "such statutes are not penal, but purely remedial in their nature," and that the liability thus declared "was but the re-enactment, *pro tanto*, of the ancient common law, for the better protection of property exposed to such unusual dangers." The conclusion in the *De Busk* case was sustained by numerous decisions by courts of last resort in other states having fire statutes similar to our own. As early as 1847 Chief Justice Shaw declared that the design as well as the legal effect of such a statute was to afford indemnity to those suffering damage from fire caused by the use of a dangerous apparatus. This same view was again expressed in 1863 by Chief Justice Bigelow, as follows: "It is not a penal statute, but purely remedial in its nature; and it is to be interpreted fairly and liberally, so as to secure to parties injured an indemnity from those who reap the advantages and profits arising from the use of a dangerous mode of locomotion, by means of which buildings and other property are destroyed." *Hart v. Railroad Co.*, 13 Metc. (Mass.) 99; *Lyman v. Railroad Co.*, 4 Cush. 288; *Pratt v. Railroad Co.*, 42 Me. 579; *Smith v. Railroad Co.*, 63 N. H. 25; *Ross v. Railroad Co.*, 6 Allen, 90; *Rodemacher v. Railway Co.*, 41 Iowa, 297. It is true that in the *De Busk* case various decisions relating to stock-killing statutes were referred to and commented upon by way of analogy or illustration. Such references and comments are not to be taken as sustaining the validity of the stock-killing statute. The question of the validity of such statute was not then before the court. As was said in *Johnson v. Bailey*, 17 Colo. 69; 28 Pac. Rep. 81: "It is not every remark in a judicial opinion that amounts to a judicial decision." In *Cohens v. Virginia*, 6 Wheat. 264, Chief Justice Marshall said: "It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subse-

quent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles, which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." The decision in *Railway Co. v. Henderson*, 10 Colo. 1; 13 Pac. Rep. 910, cannot be considered as upholding the constitutionality of the stock-killing statute. True, it was remarked in the opinion in that case that the statute was a cumulative remedy; but the real question decided was that the statute did not repeal or suspend the common-law action for damages occasioned by negligence, and the judgment of the lower court was affirmed upon the ground that the evidence fairly tended to establish negligence. The first point of the syllabus in the *Henderson* case was, therefore, unwarranted by the decision. In *Railroad Co. v. Lujan*, 6 Colo. 338, the decision turned upon a question of pleading. It does not appear that the constitutionality of the stock-killing statute was challenged, either in the *Lujan* case or the *Henderson* case. The maxim "*stare decisis*," therefore, cannot be fairly invoked as sustaining the constitutionality of such statute.

The statute making every railroad company unconditionally liable in case it shall kill or damage a domestic animal by running its trains over or against such animal stands on a footing quite different from the fire statute. Fire is a dangerous element, and according to the ancient common-law rule was, as stated in the *De Busk Case*, that "a person who makes a fire must see that it does no harm, and must answer for the damage, if it does any." In the case of domestic animals, the general rule at common law was that, if such animals trespassed upon the lands of others, the owner was liable in damages, unless he could show that the lands should have been fenced. Besides, the rule at common law was that a party running coaches or other vehicles could be held liable for damages caused by such vehicles on the ground of negligence or willful misconduct, but not when the damage was the result of pure accident. Since by the progress of invention vehicles propelled by steam and electricity have come into use as a means of transporting persons and property, the common-law rule of liability on the ground of negligence has been applied to

the operation of such vehicles, though a higher degree of diligence has been required on account of the greater liability to injury arising from the use of a more dangerous motive power. But we are not aware that it has ever been held as a common-law rule that steam or electric railway companies, lawfully operating their trains, are liable for damages thereby occasioned in the absence of negligence. By virtue of statutes, however, railway companies have frequently been required to provide additional safeguards against accidents and injuries to persons and property from the operation of their trains. These requirements have been upheld as valid police regulations, and omissions to comply therewith have been held to constitute sufficient ground of liability. For example: It has been held that a statute requiring a railroad company to fence its line of railway is a valid police regulation, and in states where such statutes have been adopted railway companies have been held liable for injuries done to domestic animals where the injury is shown to have been occasioned by the neglect of the company to fence its railway. The element of neglect is the basis of liability in such cases. Perhaps the same rule may apply where the statute gives railway companies the option of fencing their roads on pain of being held liable for injuries caused to animals through neglect to avail themselves of the opportunity of fencing. *Hayes v. Railroad Co.*, 111 U. S. 228; 4 Sup. Ct. Rep. 369; *Railway Co. v. Humes*, 115 U. S. 512; 6 Sup. Ct. Rep. 110; *Railroad Co. v. Peoples*, 92 Ill. 97; *Wilder v. Rail-Co.*, 65 Me. 332; *Barnett v. Railroad Co.*, 68 Mo. 56; *Thorpe v. Railroad Co.*, 27 Vt. 140; *Dacres v. Navigation Co.*, 1 Wash. St. 525; 20 Pac. Rep. 601.

7. It is earnestly contended that the stock-killing statute as it existed under the act of 1885 was unconstitutional. The power of the courts to declare legislative acts unconstitutional should be exercised with that delicacy and consideration which are always due to a co-ordinate department of the government. So long as a legislative act is within the sphere of legislative power—that is, so long as it is not an encroachment upon the province of some other department of the government—it will be upheld, unless clearly in conflict with some provision of the constitution of the state or nation, or in violation of some private right thereby se-

cured. The conflict between the legislative act and some specific provision of the fundamental law must, in general, be clearly apparent, or the act will not be deemed unconstitutional. That a statute may, in the opinion of the court, be against the spirit of the constitution, or against the policy of the government, is not sufficient to warrant the court in declaring it unconstitutional. The courts cannot arrest unwise or oppressive acts of legislation so long as such acts are within constitutional bounds. Cooley, Const. Lim. (6th Ed.) c. 7.

8. Stock-killing statutes similar to our own have been considered and held unconstitutional in several states. The court of appeals of this state has also expressed a like opinion. These decisions have been placed upon various grounds. The statute in question was obviously intended to be remedial as well as penal. Suth. St. Const. §§ 208, 359. The statute cannot be sustained upon the ground that it is penal. It lacks an essential element of a penal statute, in that it permits the penalty to be visited upon a party not guilty of doing anything prohibited, or of violating any duty imposed by law. Potter, Dwar. St. 74. The statute cannot be classed as merely remedial, nor as a statute of indemnity, in that it fixes the amount to be paid for certain kinds of animals by an arbitrary schedule of prices without allowing proof of their actual value. As to other kinds of animals, also, it provides for fixing their value by appraisers, without allowing proof of their real value, and in a certain contingency the value may be fixed by a proceeding wholly *ex parte*. It is no answer to these objections that the schedule of prices may be reasonable, or that railroad companies may join in the appraisal proceedings. A statute cannot be considered merely remedial or compensatory which compels a party to pay for property destroyed without allowing him to produce evidence of its value. It is true the statute says that "no railroad company shall at any time be required to pay more than the market value of any animal killed or damaged;" but nowhere in the statute is there any provision for an ascertainment of such value by evidence or by the usual mode of hearing and trial, or by any mode of actual trial. The statute not only makes a railroad company unconditionally liable for any domestic animal it may kill or damage, but it deprives the company of the mode of trial afforded

to other litigants in like cases. By the terms of the statute, when the value of an animal is fixed by the schedule, neither party can vary the same; in the appraisal of other animals neither party can be heard by witnesses or counsel. This would seem to bear equally against both parties, but it does not. The remedy of the statute being cumulative, the owner of animals killed or damaged may resort to the statute, or he may rely upon his common law action, as was held in the Henderson Case. Suth. St. Const. § 399. But when the owner resorts to the statute, there is no alternative for the railroad company, if the statute be upheld. In these respects the statute denies to railroad companies "the equal protection of the laws." It provides that they may be subjected to liability and to a judgment without opportunity for hearing or trial according to "the law of the land," and thus they may be deprived of their property "without due process of law." Such a statute cannot be upheld as constitutional. In this connection the language of Mr. Webster is most appropriate: "By the law of the land is most clearly intended the general law; a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial." Const. U. S. art. 14; Const. Colo. art. 2, § 25; Cooley, Const. Lim. (6th ed.) 431; East Kingston v. Towle, 48 N. H. 65; County of San Mateo v. Southern Pac. R. Co., 8 Amer. & Eng. Ry. Cas. 1; Railway Co. v. Outcalt (Colo. App.), 31 Pac. Rep. 177; Graves v. Railroad Co., 5 Mont. 556; 6 Pac. Rep. 16; Dacres v. Navigation Co. (Wash.), 20 Pac. Rep. 601.

9. We do not decide that the legislature has not the power to enact a valid statute making railroad companies liable for domestic animals killed or damaged by the operation of their trains, irrespective of the question of negligence. What we decide is that, as the statute did not require the fencing of railways, either imperatively or optionally, under such circumstances as are disclosed in this record, there was no basis for a penalty, and that the mode prescribed by the statute for enforcing liability as a matter of indemnity is in violation of constitutional rights.

10. By the second count of the complaint plaintiff seeks to recover twice the full value of the animal killed. This recovery is claimed on account of the alleged failure of the defendant company to keep the book and to file notice therein of the killing of said

animal, as required by amended section 15 of the statute. If we were at liberty to ignore amended section 14, the question of the sufficiency of the second count might be somewhat difficult of determination. But we are of the opinion that section 15 must stand or fall with the other sections of the statute considered in this opinion. It evidently was not designed that there should be a trial, as in other civil actions, to ascertain the actual value of the animal killed under section 15, while the schedule price or statutory mode of appraisement as provided by section 14 should be resorted to for other purposes; nor was it, in our opinion, the design of section 15 to give the owner of an animal killed twice the full value thereof in addition to the schedule price or appraised value, or double that sum, as provided by section 14. The sections of the statute considered in this opinion must be construed together as dependent, and not as independent provisions. Our conclusion is that, while the reason given for the dismissal of the action by the district court was not warranted, nevertheless, under the law as it then existed, no valid judgment could have been rendered upon the pleadings, and therefore the judgment of dismissal must be affirmed.*

1. Railroad companies—validity of statute requiring railroad companies to build and maintain cattle guards when notified by land owner.—A statute of Alabama requiring railroad companies to put in cattle guards, and keep them in order, “whenever the demand is made upon them, or their agents or employes, by the owners of the land through which said road passes that said cattle or stock guard is necessary to prevent the depredation of stock upon their farm,” is not in conflict with any provision of the state constitution because it leaves it to be determined by such landowners when such cattle guards shall be built. *Birmingham Mineral R. Co. v. Parsons* (Ala.), 13 So. Rep. 602. As to the validity of statutes requiring railroad companies to fence track or construct cattle guards, see *Minneapolis, etc., R. Co. v. Emmons*, 149 U. S. 364; 7 Am. R. R. and Corp. Rep. 755 and note.

2. Validity of statute making railroad companies liable for depredations committed by stock passing over or through cattle guards, irrespective of negligence or breach of duty.—A statute of Alabama providing that as to all stock passing over or through cattle guards on any line of railroad, and committing depredations on land, the company shall be liable for the damages proven, and all costs, etc., is unconstitutional, in that it imposes an absolute liability on the company for such damage, whether it is guilty of any negligence, or want of compliance with the requirements of the statute, or not. *Birmingham Mineral R. Co. v. Parsons* (Ala.), 13 So. Rep.

* Reported in 18 Colo. 600; 33 Pac. Rep. 515.

602. The court cites in support of this position the following cases: Zeigler v. Railroad Co., 58 Ala. 594; Wilburn v. McCalley, 63 Ala. 443; Mead v. Larkin, 66 Ala. 88; Davis v. State, 68 Ala. 63; Green v. State, 73 Ala. 32; Railroad Company v. Hembre, 85 Ala. 485. In McCandless v. Richmond & D. R. Co. (S. C.), 7 Am. R. R. & Corp. Rep. 366, a statute making a railroad company absolutely liable for damages by fires communicated from its locomotives was upheld. The doctrine of the principal case was affirmed in U. P. R. Co. v. Kerr, (Colo.), 35 Pac. Rep. 47.

3. Company may be compelled to pay attorney's fee in suits based on failure to fence, etc.—The provision of Rev. St. Mo. 1889, § 2613, for an attorney's fee as costs in favor of the plaintiff in suits for injury to stock resulting from the failure of a railroad company to fence its track, is a valid exercise of the police power, and is not in conflict with Const. Mo. art. 4, § 53, prohibiting special laws granting exclusive privileges. Perkins v. St. Louis, etc., R. Co., 103 Mo. 52; 15 S. W. Rep. 820; Briggs v. St. Louis, etc., R. Co., 111 Mo., 168; 20 S. W. Rep. 82. See, also, Minneapolis, etc., R. Co. v. Emmons, 149 U.S. 364; 7 Am. R. R. & Corp. Rep. 755 and note to McCandless v. Richmond & D. R. Co., 7 Am. R. R. & Corp. Rep. 366.

BANK OF MARYSVILLE v. WINDISCH-MUHLHAUSER BREWING Co.

(Supreme Court of Ohio, April 7, 1893.)

1. BANKS AND BANKING. RELATION OF BANK TO DEPOSITOR. Money received by a bank on general deposit becomes the property of the bank, and its relation to the depositor is that of a debtor, and not of bailee or trustee of the money.

2. EFFECT OF CHECK AS AN ASSIGNMENT OF DEPOSIT. The check of such depositor for part of the sum due him is not an assignment *pro tanto* without acceptance by the bank.

3. RIGHT OF BANK TO APPLY DEPOSIT TO DEBT OF DEPOSITOR AS AGAINST CHECK HOLDER. Where, at the time such check is drawn, or when it is presented, the drawer is indebted to the bank on past-due paper, it may treat the cross demand, existing between them as compensated, so far as they equal each other, and credit the demands accordingly; and, if there is not then sufficient balance standing to the credit of the drawer, payment of the check may be refused for want of funds.

Porter & Porter, for plaintiff in error. *W. D. Ayers*, for defendant in error

WILLIAMS, J. The Windisch-Mulhauser Brewing Company brought its action against the Bank of Marysville, in the court of common pleas of Union county. upon a check drawn on the bank by George Schlegel, October 16, 1888, for the sum of \$368.20,

payable to the order of the plaintiff. The petition alleges, in substance, that on the 19th day of October, 1888, the check, duly indorsed, was presented at the bank for payment, at which time Schlegel had sufficient funds on deposit in the bank to pay it, but payment was refused because, before the presentation of the check, the whole of the amount standing to the credit of Schlegel, on his deposit account, had been applied by the bank towards the payment of a note held by it, on which there was then due from Schlegel to the bank a sum greater than the amount of his deposit, which application, it is averred, was made without the plaintiff's knowledge or consent. The petition avers that Schlegel was insolvent when the check was presented for payment, and when it was drawn; and it also contains an allegation of the amount due on the check, for which, with interest, the plaintiff asks judgment. A general demurrer to the petition was overruled, and the defendant answered, alleging that, at the time the check was drawn, Schlegel was indebted to the bank in the sum of \$1,050 on a promissory note given to it by him, for money advanced, and other indebtedness contracted in the course of their business; and that on the 17th of October, 1888, before the presentation of the check, and without any knowledge of its existence, the bank credited the note, which was then long past due, with the amount then owing to Schlegel on his deposit account, which was \$378.41; and therefore, when the check was presented, there were no funds with which to pay it. The answer also alleges that the deposit was not made for any particular purpose, nor under any special agreement or direction, but was a general deposit, merely, and that the defendant had no means of securing or satisfying Schlegel's indebtedness to it except by applying thereon the balance due on the deposit, as was done. A general demurrer to the answer was sustained, and judgment rendered for the plaintiff, which was affirmed by the circuit court.

The bank here contends that both judgments should be reversed, because, it is claimed, the bank had a lien on Schlegel's deposit as a security for his indebtedness, which gave it the right to apply the former to the payment of the latter, or, if it had not such a lien, it was entitled to set off Schlegel's indebtedness to it against the amount due him on his deposit account. The position

taken by counsel for the defendant in error is that Schlegel did not part with the ownership and control of his money by depositing it in bank, and his check constituted an assignment and appropriation of that amount of the specific fund on which it was drawn, to the plaintiff, after which the bank could not, without the plaintiff's consent, apply the fund in payment of Schlegel's past-due note, or set off the one against the other. That view of the law appears to have been adopted by the courts below, and no other is advanced here in support of the judgments there rendered.

There are cases in which it is held that a bank check for a part of the sum standing to credit of the drawer is an equitable assignment *pro tanto*; and expressions of that purport may be found in opinions of judges, in cases where the question was not involved. Counsel for defendant in error relies chiefly on *Stewart v. Smith*, 17 Ohio St., 82-85, where it is said: "Such a check is an appropriation of a specific sum in the hands of the drawee to the absolute use and control of the holder:" and it is argued that, being such an appropriation, the title to the fund at once vests in the payee of the check, and cannot be defeated or affected by any subsequent act of the drawee. The question in that case was whether the drawer of the check was discharged by reason of delay in its presentation for payment; and the sentence above quoted from the opinion of the learned judge occurs in the discussion of the difference, in its legal effect, of delay in presenting bills of exchange and bank checks for acceptance and payment. In the recent case of *Covert v. Rhodes*, 48 Ohio St. 66, 27 N. E. Rep. 94, it was held, after full consideration, that such a check, before acceptance, does not constitute an assignment, so as to vest the title to the fund or credit against which it was drawn, or any part of it, in the payee or holder. Some of the authorities which maintain that doctrine are collected in that case, to which many more might be added. The rule results from the legal relation of the bank to its general depositor. The former is not a bailee or trustee, in any sense of the money of the latter. The bank does not contract to keep on hand the particular money deposited, or pay the depositor's checks out of it, nor is it expected to do so. The money of such depositor is commingled with other moneys of the bank, the amount de-

posited carried to the customer's credit in account with the bank, and payments made on his checks are charged to his account. Unless there is some agreement to the contrary, deposits received by the bank become its property. They belong to it, and can be loaned or otherwise disposed of by it as any other money belonging to the bank. If the money be stolen or destroyed, the loss must be borne by the bank, though it be free from negligence or fault. It is accountable as a debtor, and the relation between it and the general depositor is essentially that of debtor and creditor. In legal effect the deposit is a loan to the bank. Hence a check of such a customer is not drawn upon a specific fund, but is an order drawn by a creditor on his debtor, requesting him to pay part of what is due the creditor to the payee or holder. It no doubt evidences an intention of the drawer to have the sum specified paid to the holder, but does not transfer the title to any fund, or part of it, or the bank's liability to the drawer. If it effected such a transfer, upon the failure of the bank before the check could be presented, in the exercise of due diligence, the loss would fall on the holder, as between him and the drawer; and, whether presented or not, the former could pursue the deposit in the hands of an assignee or other representative of the bank. But, as the check does not operate as a transfer of the title to any fund, neither of these consequences result.

The liability of the bank to Schlegel being that of a debtor, only, it does not seem of much practical importance in the disposition of the case whether the effect of the check was to assign that much of his claim to the plaintiff or not. The case made by the pleadings is this: The bank owed Schlegel, on his deposit account, when he gave the brewing company his check, more than the amount for which it was drawn. At the same time, Schlegel owed the bank, on his note, a sum greater than the bank's indebtedness to him. These mutual debts existed between the parties in the same relation, were both past due, and each was founded on contract. Our statute secures the right of set-off between parties sustaining the relation of debtor and creditor, between whom there are such demands, and those existing between banks and their customers are not excepted from its operation; so that if Schlegel, when the check was drawn, had brought an action on his claim against the bank, the latter could have set off

against it the debt which Schlegel owed the bank. And it is clear the right of set-off was not defeated or impaired by the check, even if it be treated as an assignment. The statute plainly protects the right of set-off, when it existed between the parties, notwithstanding the assignment by either of his demand. Its language is: "When cross demands have existed between persons, under such circumstances that if one had brought an action against the other a counterclaim or set-off could have been set up, neither can be deprived of the benefit thereof by assignment by the other; but the two demands must be deemed compensated, so far as they equal each other." Rev. St. § 5077. By force of the statute the indebtedness of the bank to Schlegel was paid by a corresponding amount of the indebtedness of Schlegel to the bank; and crediting Schlegel's note with the amount due on his deposit account, as was done by the bank, was but giving effect to the provisions of the statute.

It is said to be a well-settled rule of the law merchant that a bank has a general lien on all the funds of a depositor in its possession for any balance due on general account, or other indebtedness contracted in the course of their dealings, and may appropriate the funds to the payment of such indebtedness. The right to make such appropriation, it is held, grows out of the relation of the parties, as debtor and creditor, and rests upon the principle that, "as the depositor is indebted to the bank upon a demand which is due, the funds in its possession may properly and justly be applied in payment of such debt, and it has therefore a right to retain such funds until payment is actually made." *Falkland v. Bank*, 84 N. Y. 145. Though this right is called a "lien," strictly it is not, when applied to a general deposit, for a person cannot have a lien upon his own property, but only on that of another; and, as we have seen, the funds of general deposit in a bank are the property of the bank. Properly speaking, the right, in such case, is that of set-off, arising from the existence of mutual demands. The practical effect, however, is the same. The cross demands are satisfied, so far as they are equal, leaving whatever balance may be due on either as the true amount of the indebtedness from the one party to the other. Aside, then, from any question as to whether the plaintiff could maintain its

action on the check without acceptance of it by the bank, the petition fails to make a case against the defendant. True, the petition does not allege that the deposit made by Schlegel in the defendant bank was a general one, but it is presumed to be such unless it otherwise appear; and there is nothing in the petition from which it may be inferred that the deposit was special, or made under any particular agreement or direction. It is also true the petition avers that when the plaintiff presented the check for payment the drawer had sufficient funds in the bank for its payment; but it is alleged that the bank held the past-due paper of Schlegel for an amount exceeding his deposit, and had applied the whole amount due him in payment of the paper before the presentation of the check. It is not important that the application was made without the plaintiff's consent. Such consent was not necessary to give validity to the application, and, if it were, the want of it would not entitle the plaintiff to recover, for the right to have the claims set off would still exist. The judgments of the circuit court and court of common pleas are reversed, and cause remanded, with instructions to sustain the demurrer to the petition, and for further proceedings.*

1. Effect of check as an assignment of funds—right of check holder to sue bank.—These questions are considered and passed upon in *Pickle v. People's National Bank*, 1 Am. R. R. & Corp. Rep. 831; *Fonner v. Smith*, 3 Am. R. R. & Corp. Rep. 642; 5 Am. R. R. & Corp. Rep. 104, note. In *First National Bank v. Clark*, 134 N. Y. 368; 32 N. E. Rep. 38, it was held that the giving of a check by a bank depositor for the full amount of the deposit does not operate as an assignment to the holder of the check, so as to enable him to enforce payment thereon against the bank prior to its acceptance of the check. In the same case it was also held that a deposit slip issued by a banker, acknowledging the receipt of the amount of money therein named, is intended merely to furnish evidence, as between the depositor and the bank, that on a given day there was deposited a given sum, and not that such sum remains on deposit, and that the delivery of the deposit slip with a check for the amount does not operate as an assignment of the fund. See, also, *Fourth Street National Bank v. Yardley*, 55 Fed. Rep. 850.

2. Effect of bank accepting check by telegram—liability of bank.—Plaintiff telegraphed to defendant: "Will you pay I.'s check for \$1,800 on presentation?" and defendant wired back: "Yes; will pay the I. check." Held, that the telegrams sufficiently identified the check to sustain an action for breach of the promise to pay. *Henrietta Nat. Bank v. State Nat. Bank*, 80 Tex. 648; 16 S. W. Rep. 321.

*Reported in 38 N. E. Rep. 1054.

3. What amounts to acceptance by bank—variation.—One T., having purchased certain cattle, offered his check for \$22,000 in payment. The seller refused to accept it or part with the cattle until assured that the check would be paid, and, therefore, telegraphed the drawee, asking if it would pay T's check for \$22,000. The drawee answered "T. is good. Send on your paper." Held, that this constituted a contract to pay the check on presentation. *North Atchison Bank v. Garretson*, 2 C. C. A. 145; 51 Fed. R. 168; affirming 39 Fed. R. 163, and 47 Fed. R. 867. The fact that the check was drawn "with exchange," no place of exchange being named, and the check being dated and payable in the same town, was held to be no ground for refusing payment, the words "with exchange," under such circumstances, being mere surplusage. *Ibid.*

The payee of a check whose endorsement has been forged thereon has no right of action against the bank upon which it was drawn, for money had and received, because the bank, supposing the endorsement to be genuine, charged the amount of the check to its depositor, the drawer, credited its correspondent from whom the check was received with an equal amount, and afterwards, upon discovery of the forgery, returned the check to its correspondent, and made entries in its books equivalent to a cancellation of its former entries. The check was neither paid nor accepted. *Freeman v. Savannah Bank and Trust Co.*, 88 Ga. 252; 14 S. E. Rep. 577.

SEARS ET AL. V. SEATTLE CONSOLIDATED ST. RY. CO.

(Supreme Court of Washington, April 17, 1893.)

1. STREET RAILROADS. INJURY TO PASSENGER. OPINION EVIDENCE AS TO SPEED OF CAR. In an action against a street-railway company for personal injuries caused by a car running into a wagon, a witness, after relating his observations at the time of the accident as to the rate of speed of the car and the exertions of the motorman to stop it, may express his opinion as a conclusion of the fact that the motorman was unable to stop the car sooner because he was "running at too high a speed to stop it in that distance."

2. ARGUMENT OF COUNSEL. NOT RESTRICTED IN MAKING INFERENCES FROM THE EVIDENCE. Where it appeared that the motorman was discharged by the company soon after the accident, but there was no evidence why he was discharged, it was not error to permit counsel, in addressing the jury, to argue that the motorman was discharged on account of incompetency and carelessness at the time of the accident, though the conclusion is unwarranted, since the court cannot compel counsel to argue logically.

3. DEGREE OF CARE TO BE EXERCISED FOR THE SAFETY OF PASSENGERS. INSTRUCTIONS. In an action by a passenger against a street-railway company for personal injuries, a charge that defendant was bound to exercise the highest degree of care, prudence, and caution in operating its cars so as to prevent injury to its passengers is proper, and is not open to the objection that it in effect informed the jury that defendant was an insurer of the lives and limbs of its passengers, and would be responsible for an injury to a passenger, though it had used all care possible under the circumstances.

4. COLLISION WITH WAGON ON TRACK. EFFECT OF NEGLIGENCE OF DRIVER ON PASSENGER'S RIGHT OF RECOVERY. In an action by a passenger against a street-railway company for personal injuries received by a car running into a wagon on the track, the fact that the negligence of the driver of the wagon contributed to the injury is no defense.

5. DUTY OF MOTORMAN WHEN DRIVER OF VEHICLE FAILS TO LEAVE TRACK. NEGLIGENCE. Where a motorman on a street car sees that a man driving a wagon along the track neither looks back nor pays any attention to the ringing of the bell by increasing his speed or attempting to leave the track, it is his duty to bring his car under control, and the company is liable for injuries to the passengers if he continues until it is impossible to stop.

6. EXCESSIVE DAMAGES. Where a strong healthy woman, 30 years old, and earning \$50 a month in addition to performing her own household duties, is injured by the negligence of a street-railway company while riding on one of its cars, and made a helpless invalid for life, a verdict for \$15,000 is not excessive.

Wiley, Scott & Bostwick, for appellant. *Thompson, Edsen & Humphries*, for respondents.

ANDREWS, J. The appellant owns and operates lines of street railways in the city of Seattle, one of which has its terminus at Fremont, a suburban village some distance from the main portion of the city, and situated at the north end of Lake Union. It is known as the "Fremont Line," and connects with another line of street railway which extends to Green Lake, in the northern portion of the city. On September 16, 1891, the respondent Annie Sears entered upon one of the cars of the appellant to go to Green Lake. The motive power used upon the said railway is electricity, and the car upon which the respondent became a passenger at the time above mentioned was what is called an "open car." Before reaching Fremont, and while the car upon which Mrs. Sears was riding was going down a grade on Roland street, it collided with a wagon which was upon appellant's track, and going in the same direction, ran off the track, and turned to the left, and ran across the street to the verge of an embankment, which was 16 feet from the left, or west, rail of the railway track. The respondent was seated on the right-hand side of the car, and when she saw that the car was leaving the track she became frightened, and rose up from her seat, and took hold of the post supporting the roof of the car with her right hand, to steady herself, and endeavored to jump from

the car. In so doing she struck upon her feet, but was thrown down upon her back close to the left-hand side of the track, and thereby received a serious injury. Nearly all of the other passengers leaped from the car at about the same time, but neither they nor the one or two persons who remained in the car were in any wise injured. The respondents, who are husband and wife, instituted this action to recover damages for the injury so received by said Annie Sears, and alleged in their complaint that said injury was caused by the negligence of the servants and employes of appellant in the management of its car. The defendant, in its answer, denied that the alleged injury was caused by any negligence or carelessness on its part, and affirmatively alleged that if the said Annie Sears sustained the injury mentioned in the complaint it was caused wholly by her own carelessness and negligence. There was a verdict and judgment for plaintiffs, and the defendant brings the case here for review.

The first error assigned by the appellant is that the trial court, over the objection of appellant, wrongfully permitted a witness for plaintiffs, Mr. Eck, to answer the question, "What was there, if anything, to prevent him (the motorman) stopping the car and applying the brakes a long time before he did?" The witness answered, "He was running at too high speed to stop it in that distance." The learned counsel for the appellant insists that this was, in effect, permitting the witness to give his opinion to the jury upon the question whether or not the defendant was negligent in the management of its car. The witness had already testified that the car was running at the rate of about 12 miles an hour; that the wagon on the track was in plain view for a distance of 400 feet; that the motorman commenced ringing the bell as a warning of his approach at about that distance from the wagon, and rang it continuously thereafter; that the man in the wagon made no attempt to get off the track until the car was pretty close to him; and that when the motorman found that the wagon was not going to get out of the way in time he made every effort possible to stop the car, but that he was then within a hundred feet or more of the wagon. Under these circumstances we think it was not error to overrule the objection to the question, even upon the theory of the appellant that the testimony given in response thereto was the

expression of the opinion of the witness, and not the statement of a fact within his own knowledge. It is a general rule of evidence that witnesses may not give opinions as to matters of fact which the court or jury are ultimately to determine. But this rule is not without exception. And "the exception is not confined to the evidence of experts who may give opinions on questions requiring special skill, knowledge, or learning, but includes the evidence of common observers, who may state the results of their observations in regard to ordinary appearances and conditions of things which cannot be produced to a jury exactly as they were observed by the witness at the time." Nonexpert witnesses, who have had opportunities to observe, and who have actually observed, the demeanor, actions, and appearance of a particular individual, are competent to express an opinion upon the question whether such person was sane or insane; and every person of ordinary understanding and intelligence is competent to give an opinion as to the identity of persons or things, as to whether another appeared to be sick or suffering from pain, and as to the direction from which a blow was delivered which produced a wound upon the person of another. *People v. Hopt*, (Utah), 9 Pac. Rep. 407.—Of course, the weight of such testimony depends upon the thoroughness of the observation of the witness; and whether he has sufficiently observed and considered the particular fact or matter under consideration to enable him to form an opinion in respect thereto is a question which, if raised, is to be determined by the court by the application of the same rule which governs in ascertaining the qualifications of experts. In *People v. Hopt*, *supra*, this question is very elaborately and satisfactorily discussed, and many cases cited showing particular instances in which non-experts have been allowed to express opinions. And the supreme court of Utah, in delivering the opinion in that case, said: "The admissibility of the evidence rests upon three necessary conditions: First, that the witness detail to the jury, so far as he is able, the facts and circumstances upon which his opinion is based, in order that the jury may have some basis by which to judge of the value of the opinion; second, that, the subject-matter to which the testimony relates cannot be reproduced and described to the jury precisely as it appeared to the witness at the time; and, third, that the facts upon which the wit-

ness is called upon to express his opinion are such as men in general are capable of comprehending and understanding." We think the rule there laid down is clearly deducible from the authorities, and that, tested by it, there was no error in the ruling of the court upon the point in question. The witness in this case expressed his opinion as a conclusion of fact, based upon the observation made by him at the time of the accident as to the rate of speed of the car, and the exertions made by the motorman to stop it; and it seems to us that the testimony is clearly embraced within the rule above stated.

On the trial of this cause it was shown, upon the cross-examination of the motorman in charge of the car at the time in question, that he was discharged by the railway company about three weeks after the casualty occurred, but no testimony was adduced showing why he was so discharged. Counsel for the respondents, in alluding to the fact, in his address to the jury remarked, among other things: "Mr. Silverthorn states that he did his whole duty, but that, notwithstanding that, the company discharged him. Gentlemen, he did not do his duty, and the company discharged him on account of his carelessness and incompetency at the time of the accident." Counsel for the appellant objected to the remarks so made, on the ground that there was no evidence that the man was discharged on account of this accident. The counsel for the respondents then admitted that there was no such testimony, but insisted that his argument was proper upon the evidence before the jury. The judge also stated that there was no evidence that the motorman was discharged on account of the accident, but further remarked that the court will allow the utmost freedom in the argument of the case, and counsel has a right to argue what he may deem the testimony may prove, and draw such inferences from it as he may see fit. It is for the jury to determine what the facts are. The court cannot indicate what the argument shall be. The court bears the counsel out in saying there was no testimony that he was discharged in consequence of it, but that he was discharged two or three weeks afterwards; but why he was discharged I believe is a proper matter for comment to the jury." The learned counsel for the appellant excepted to the ruling of the court, and now contends that the same was erroneous and prejudicial to appellant. But we think the appellant

is not entitled to a judgment of reversal on that ground. It is the duty of the court in all cases to restrict the argument of counsel to the facts in evidence, and not to permit the opposite party to be prejudiced by any statement of facts not a part of the evidence. But counsel must be allowed some latitude in the discussion of their causes before the jury, and, if they are not permitted to draw inferences or conclusions from the particular facts in evidence, it would be impossible for them to make an argument at all. The mere recital of facts already before the jury is not an argument. There must be some reason offered for the purpose of convincing the mind, some inference drawn from facts established or claimed to exist, in order to constitute an argument. But counsel cannot be compelled by the court to reason logically, or to draw correct inferences, from given facts; and if they err in these respects it is no ground for a new trial. *Proctor v. De Camp*, 83 Ind. 559. See, also, *Hinton v. Railroad Co.*, 65 Wis. 323; 27 N. W. Rep. 147; *Scott v. Railroad Co.*, 68 Iowa, 362; 24 N. W. Rep. 584, and 27 N. W. Rep. 276; *Dowdell v. Wilcox*, 64 Iowa, 721; 21 N. W. Rep. 147; *Railroad Co. v. Hawthorne*, 3 Wash. T. 353; 19 Pac. Rep. 25; *Lumber Co. v. Cole*, 2 Wash. St. 74; 25 Pac. Rep. 1077. In this case, although counsel may have drawn an unwarranted conclusion from the fact that the manager of the car was discharged some time after the accident, still we think he had a right to comment on the evidence, and to draw such inferences from it as he deemed fit and proper, and the court properly refused to undertake to prevent him from so doing.

It is claimed, however, by the appellant, that the testimony upon which the remarks of the respondents' counsel were based, that the motorman was discharged, was incompetent, and therefore prejudicial to the appellant. However that may be, it is not shown by the record that the testimony was objected to when offered, and the objection cannot be here made for the first time. It seems altogether probable that, if this testimony had been objected to in the trial court, it would have been excluded, for the jury were specially instructed that the fact that the motorman was discharged raised no presumption of negligence on the part of the railway company; and this instruction, which we cannot presume was disregarded by the jury, plainly indicated to them that the inference drawn from the testimony by counsel for the respond-

ents, and which he sought to impress upon their minds in his closing argument, was not warranted, and should not be entertained by them. Upon the cross-examination of the witness Silverthorn, the motorman in charge of the car, counsel for the respondents, with a view to impeach him, asked him if he did not make certain statements to one Eck, in a conversation with the latter at Fremont, soon after the accident. The testimony was objected to by counsel for the appellant, and the objection overruled by the court. But, as the witness denied making any of the declarations imputed to him, and as all of the testimony of Eck in reference to the conversation was stricken out by the court on motion of counsel for the appellant, we fail to see wherein the appellant was prejudiced by the action of the court in that regard.

The next alleged error relates to the instructions given to the jury. It is contended that the court erred in charging the jury that the defendant was bound to the exercise of the highest degree of care, prudence, and caution in the running and operating of its cars, so as to prevent injury to its passengers; and it is claimed by the appellant that this instruction, in effect, informed the jury that the appellant was an insurer of the lives and limbs of its passengers, and would be responsible for an injury to one of its passengers, even though it had used all the care and prudence which it was possible to use under the circumstances. But we do not think that the instruction, especially when applied to the facts and circumstances of the case, is fairly susceptible of the construction placed upon it by counsel for the appellant. If the appellant used all the care and prudence which it was possible to use under the circumstances, then, in the language of the court, it used the highest degree of care, prudence and caution. The highest degree of care, prudence and caution, in running and operating street cars, so as to prevent injury to passengers, cannot be said to mean such a degree of care as will absolutely prevent injury, or such care as is inconsistent with that mode of conveyance, but means simply the highest degree of practicable care and prudence in conducting that particular business. Instructions similar to the above have frequently been approved by the courts. See *Railway Co. v. Higgs*, (Kan.) 16 Pac. Rep. 667; *Sales v. Stage Co.*, 4 Iowa, 547; *Fairchild v. Stage Co.*, 13 Cal.

599; Stokes v. Saltonstall, 13 Pet. 181; Dougherty v. Railroad Co., (Mo. Sup.) 8 S. W. Rep. 900; Coddington v. Railroad Co., 102 N. Y. 66; 5 N. E. Rep. 797; Furnish v. Railroad Co., (Mo. Sup.) 13 S. W. Rep. 1044. But the court also instructed the jury, at the request of the appellant, as follows: "You are instructed, while the defendant, as a common carrier of passengers, is held to the highest degree of care and prudence which is consistent with the practical operation of its cars and transaction of its business, still it is not an insurer of the lives and limbs of its passengers." The appellant, of course, makes no complaint against this latter instruction, but insists that the two are inconsistent with each other, and hence misleading and erroneous; but we cannot agree with counsel's contention. The latter modifies, or rather explains, the meaning of the former, but we cannot see that it in any wise contradicts it.

In our opinion, the court properly refused to give to the jury instructions Nos. 6 and 7, requested by the appellant. They were predicated upon the idea that because the man in charge of the wagon failed to drive off the track, as he should have done, and as the motorman expected, in time to avoid a collision, and was thus in some measure to blame for the accident, the appellant should not be held responsible. No doubt the instructions requested would have been proper in an action against the appellant by the driver of the wagon for damages to him caused by the collision; but in this case the respondents had no control over the driver of the wagon, and no contractual relation whatever existed between them and him, and they were in no way responsible for his actions. "It is no defense for a negligent carrier, as against his passenger, that the negligence or trespass of a third party contributed to the injury, although the latter acted independently of the carrier." 2 Shear. & R. Neg. (4th Ed.) § 502; Eaton v. Railroad Co., 11 Allen, 500; Carpenter v. Railroad Co., 97 N. Y. 494; Little v. Hackett, 116 U. S. 366, 6 Sup. Ct. Rep. 391.

The questions for the jury to determine were, was the appellant guilty of negligence in the management of its car, and if so, was the injury sustained by the respondent Mrs. Sears solely the result of such negligence? The jury answered these questions in the affirmative, and a careful examination of the evidence con-

vinces us that they arrived at a correct conclusion. No reason is not given for not stopping the car before it came in contact with the wagon, except that the man in charge thought that the wagon would be removed from the track before he reached it. And yet this same man testified that the man in charge of the wagon made no attempt to leave the track until the car was so near him that a collision could not be avoided by putting on the brakes or reversing the motion of the wheels of the car. It seems plain to us that when the motorman saw that the person on the wagon neither looked back, nor paid any attention to the ringing of the bell, nor increased his rate of speed, nor attempted to leave the track, it was his duty to bring his car under control, and even to stop, if necessary, to avoid a collision. 2 Shear. & R. Neg. § 483. By the exercise of reasonable care and diligence on the part of appellant's employe, the injury might have been avoided, and, by failing to exercise such care and diligence, he failed to discharge his duty to the respondent Mrs. Sears as a passenger. The wagon was seen by him at a distance of least 400 feet, and no valid reason is shown why the car could not have been stopped within half that distance; and the motorman himself says he would have stopped if he had known that the wagon was going to remain on the track.

The jury in this case assessed the damages at \$15,000, which sum appellant claims is excessive. The amount of damages, in cases like this, to which a party is entitled, is a matter to be determined by the jury from all the facts and circumstances and their verdict should not be disturbed on the ground of excessiveness unless the amount is so large as to indicate passion or prejudice. The sum awarded by the jury is certainly a large one, but we are unable to discover that it was the result or passion of prejudice, or that it is even greatly in excess of a fair compensation for the injury received. The testimony shows that Mrs. Sears at the time of the accident was a strong, healthy woman, of the age of 30 years; that she was industrious, and, in addition to looking after her own household duties, had been making \$50 per month. The testimony further shows that her injury is permanent; that she has lost the use of her lower limbs by reason of paralysis resulting from a concussion of the spinal cord, and that she will be a helpless invalid during the remainder of her life. These

facts were all before the jury, and they have, so far as we can see, exercised their best judgment as to the amount of compensation she ought to receive; and we perceive no legal grounds for disturbing the verdict. *Railway Co. v. Dorsey* (Tex. Sup.), 18 S. W. Rep. 444; *Robinson v. Marino* (Wash.), 28 Pac. Rep. 752; *Phelps v. The City of Panama*, 1 Wash. T. 518; *Railroad Co. v. Hawthorne*, 3 Wash. T. 353; 19 Pac. Rep. 25. The judgment of the court below is affirmed.

DUNBAR, C. J., and SCOTT, J., concur.*

1. Street railroads—injury to person crossing tracks—failure to look—contributory negligence.—Where one undertakes to cross a street car track with a wagon having a hood over it, confining his view of the track to thirty feet, the failure to lean forward so as to see an approaching car is negligence *per se*, barring a recovery for injuries received from a collision. *Wheelahan v. Philadelphia Traction Co.*, 150 Penn. St. 187; 24 Atl. Rep. 688. To same effect, *Carson v. Federal Street, etc., R. Co.*, 147 Penn. St. 219; 23 Atl. Rep. 369.

2. Injury to one driving along track—failure to have head light—negligence and contributory negligence.—In an action against an electric railroad it appeared that plaintiff and her husband, while driving along the track after dark, were struck and injured by a car; that there was no head-light on the car, nor any light either inside or out; and that it was running fifteen or twenty miles an hour. Previous to that time the cars had used head-lights. The husband testified that when he went upon the track he looked for a car, but did not see any; and that, if the car had had a head-light, he could have seen it one and one-half or two miles. The wife testified that she too looked for a car when they went upon the track, but that afterwards she did not look particularly, as she thought they would see the head-light. The first warning she had of the car was the sight of the flame on the trolley, and the glitter of the car-window. It was then too late to get out of the way. Held, that the plaintiff and her husband were not negligent in driving upon the track, and that whether they used ordinary care to prevent the collision was a question for the jury. *Rascher v. East Detroit, etc., R. Co.*, 90 Mich. 413; 51 N. W. Rep. 463.

In an action for personal injury sustained in a collision between plaintiff's wagon and defendant's street-car, it appeared that plaintiff was a police officer in charge of a patrol wagon carrying an injured man on a stretcher, and, while on defendant's track, his wagon was struck by the car coming from the opposite direction. Plaintiff's driver gave evidence, which was corroborated, that he saw the car, and tried to pull off of the track, doing so slowly, on account of the injured man; that, when about 60 feet from the car, he hallooed as loud as he could to stop the car; that an officer also hallooed several times to stop the

* Reported in 33 Pac. Rep. 389.

car; that the car-driver was looking behind his car, and did not attempt to slacken the speed before the collision. Held, that defendant's motion for a nonsuit was properly denied, as driving a wagon on a street-car track is not negligence *per se*, and the evidence was sufficient to show the car-driver negligent in not looking ahead to observe whether the track was clear. *Swain v. Fourteenth Street R. Co.*, 93 Cal. 179; 28 Pac. Rep. 829.

8. Law of the road—whether applicable to vehicles meeting street cars.—Hill's Code, § 2064, requires persons driving vehicles on meeting on any public highway to turn to the right. Held, that the court properly refused to charge that this statute applied to "vehicles meeting a street-car, and, where a collision occurs with a vehicle, and that vehicle is on the wrong side of the road at the time of such collision," it is "*prima facie* evidence of negligence on the part of the person driving such vehicle, and will defeat any action for damages brought by such person, unless it appears that it did not contribute to produce the injury for which the action is brought, and plaintiff be free from the imputation of negligence in other respects." *Spurrier v. Front Street Cable R. Co.*, 3 Wash. 659; 29 Pac. Rep. 846. It was proper to refuse to charge that, as plaintiff was on the wrong side of the street at the time of the accident, the presumption arises that the collision was due to her fault, since a person has a right to travel on any part of a street, provided he regards the rights of others. *Ibid.*

RUTLAND ELECTRIC LIGHT CO. v. MARBLE CITY ELECTRIC LIGHT CO.

(Supreme Court of Vermont, April 22, 1893.)

1. **ELECTRIC LIGHT COMPANIES. INTERFERENCE OF WIRES AND CURRENTS ALONG STREETS. RIGHT OF PRIOR COMPANY.** Where an electric light company has, under an authorized contract with a city, allowing it to erect poles and string wires in the streets, expended money in establishing its plant and appliances, it has a vested right to use its wires, which cannot be infringed by another company's stringing interfering wires under a subsequent contract with the city.

2. Where the second company in such case strings its wires so close to those of the first company as to interfere with them, and in such a position as to cause danger to the first company's employes, it will be required to pay the damages caused thereby, and will be perpetually enjoined from such interference.

BILL by the Rutland Electric Light Company against the Marble City Electric Light Company for damages and an injunction. The bill was dismissed *pro forma*, and the orator appeals.

George E. Lawrence and *C. H. Joyce*, for appellant. *J. C. Baker*, for appellee.

TYLER, J. The orator and defendant are rival corporations, organized under the general laws of this state for the purpose of carrying on, respectively, the business of electric lighting in the village of Rutland. In May, 1886, the orator entered into a written contract with the trustees of the village for lighting the village streets, and, acting upon and in compliance with that contract, it established a plant, erected poles, strung wires, and commenced doing business. It was stipulated that, where wires crossed streets, they should not be within 30 thirty feet of the ground, and street line wires should be at least 20 feet above the ground. The poles were erected at points indicated by the trustees. Some three years later the defendant, by permission of the trustees, erected poles, strung wires, and commenced the business of electric lighting in competition with the orator. Its poles were also placed under direction of the trustees. In some of the principal streets the poles were set on the same side as the orator's poles, and quite near to them. The orator employs a system for lighting buildings with incandescent lamps with a current of electricity used on its wires of only 110 volts which is so low a current that the wires, when charged, can be handled with safety. The defendant uses for its incandescent lamps an alternating current of 1,000 volts on its wires on the streets. By means of what are called "converters," a current of 50 volts is taken into buildings. When the defendant's wires were first strung upon the poles they did not touch the wires and poles of the orator, but from the effect of storms, from stretching, or some other cause, they now sometimes come in contact with the orator's poles and wires, and injure them. The wires should not be nearer each other than 12 inches, and the crosspieces upon which they are strung should be at least 2 feet apart, so that when the wires are loaded with snow and ice, or when swayed by the wind, they will not come in contact. When a wire carrying a heavy current comes in contact with one carrying a lighter current, the heavy current is liable to be inducted into the other wire, which endangers the orator's wires, lamps, and plant, and is liable to set fire to buildings, for which the orator would be answerable in damages. The defendant's poles are not as high as those of the orator. The crosspieces to which its wires are attached are nearer the ground than those of the orator, so that in places the defendant's wires are

under the orator's, which renders it difficult and dangerous for the orator's employes to reach their wires for repairs and other purposes. No accident has thus far happened. The defendant's wires are not usually charged with electricity in the daytime, but the two plants are entirely independent of each other, and the orator's employes have no means of knowing when the defendant's wires are charged. Where the wires of the parties cross Centre street the orator's is only 21 feet above the ground; the defendant's is strung above it, and, having sagged, rests upon it. At other places, where the respective wires enter buildings, they interfere with each other. These are the material facts found by the master. It is conceded that the village trustees had authority to make the contract with the orator.

The defendant virtually concedes that the orator's contract with the trustees is the measure of its rights. The village, by its trustees, invested the orator with certain rights, and, after the orator, relying upon the contract, had expended money in establishing its plant and appliances, the village could not, by an ordinance, have infringed these rights; and clearly it could not confer upon the defendant authority to infringe them. On the other hand it is not claimed that the orator obtained a privilege of the streets to the exclusion of the defendant, but that the defendant's rights were subordinate to the orator's, and must be exercised in such a manner as not to interfere with them. If authorities were required to sustain so plain a proposition, those cited upon the orator's brief are pertinent. In *Hudson Tel. Co. v. Jersey City*, 49 N. J. Law, 303, 8. Atl. Rep. 123, it was held that where the city, by an ordinance, under statutory authority, had designated certain public streets in which the company might place its telegraph poles, and the company had expended money in placing its poles upon such streets, the city could not, by subsequent ordinances, revoke such designation; that the company had an irrevocable vested right to use the streets for the designated purpose. Thompson's Law of Electricity lays down the general rule that when a municipal corporation, under a statutory provision, has, by ordinance or other lawful mode, authorized a telephone company to erect its posts or poles in certain designated streets, and the company proceeds to erect them, and to expend money on the faith of the license so granted, it thereby acquires

a vested right to the use of the designated streets, so long as it conforms to the conditions of the license; and the license cannot thereafter be revoked by the municipality. So an ordinance authorizing a telephone company to maintain lines on its streets, without limitation as to time, for a stipulated consideration, when accepted and acted upon by the grantee, by a compliance with its conditions, becomes a contract, which the city cannot abolish or alter, without consent of the grantees. It appears that the orator has suffered some damage in consequence of its wires coming in contact with the defendant's; that it is constantly exposed to danger from such contact, and that its men cannot conveniently and without danger reach its wires for the purpose of making repairs and of connecting lines therewith to buildings. We therefore think that the orator is entitled to relief according to the prayer of the bill. The *pro forma* decree dismissing the bill is reversed, and the cause remanded. An accounting is ordered for the damages already suffered by the orator, and the orator may have a perpetual injunction restraining the defendant from maintaining its wires so as to interfere with those of the orator.*

Interference of different electric currents in streets—questions of priority and superior right.—The decision in the foregoing case is in accordance with that in Consolidated Electric Light Co. v. People's Electric Light & Gas Co., 94 Ala. 372; 10 So. Rep. 440. See reference to this case in note 6 Am. R. R. & Corp. Rep. 630.

In Cincinnati Inclined Plane Ry. Co. v. City & Suburban Tel. Ass. (Ohio), 4 Am. R. R. & Corp. Rep. 533 and Hudson River Tel. Co. v. Watervliet Turnpike & R. R. Co. (N. Y.), 6 Am. R. R. & Corp. Rep. 619, the relative rights of a telegraph company and electric railway company on the same street are considered and passed upon.

CINCINNATI, N. O. & T. P. RY. CO. v. BARKER ET AL.

(Court of Appeals of Kentucky, Feb. 16, 1893.)

1. RAILROAD COMPANIES. FIRES SET BY LOCOMOTIVES. PLEADINGS AND EVIDENCE. Though, in an action against a railroad company alleging that, by negligently setting fire to its depot from the sparks of an engine, plaintiff's storehouse was also burned, the court strikes out of the petition allegations

* Reported in 26 Atl. Rep. 635.

that the depot was dangerously combustible, and that this was known to defendant, yet it is proper on the trial to show that the depot had a shingle roof, that its eaves were open, and that birds built nests of straw therein; and that it had frequently been set on fire before.

2. While the mere fact that the depot was covered with shingles is not, of itself, ordinarily evidence of negligence, yet when the building is so situated that, from some reason, it is frequently fired by passing trains, and it is proved that the company knew of the combustible material of which the roof was composed, and that it had before been fired by sparks, if the company used a spark-throwing locomotive near such a roof, and fired it, the fire would be caused by negligence.

3. INSTRUCTIONS. While a charge that, if the jury believed that defendant's depot was burned by negligence in its construction they should find for plaintiff, would be uncertain in meaning if unexplained, yet if, when taken in connection with the proof, it is not ambiguous or misleading, no error can be predicated thereon.

4. CONTRIBUTORY NEGLIGENCE. BUILDING NEAR TRACK. It was not negligence for the plaintiff to build his house near the track, though he knew it was more exposed to fire than if at a greater distance.

5. PROXIMATE CAUSE. FIRE COMMUNICATED FROM INTERMEDIATE BUILDINGS. If the fire spreads from the matter first ignited, the intervention of considerable space, or of various physical objects, or a diversity of ownership, does not preclude recovery by the party injured, or affect the company's liability for its first negligent act.

*C. B. Simrall, O. H. Waddel and W. A. Morrow, for appellant;
W. O. Bradley and J. L. & J. W. Colyer, for appellees.*

HAZELRIGG, J. The Barkers, as plaintiffs in the court below, brought suit against the defendant, now appellant, alleging that on the night of April 5, 1889, "the defendant negligently set fire, by sparks and coals from its locomotive, to its depot, which consumed the same, and which extended to and consumed the storehouse of plaintiffs aforesaid; that said negligence of the defendant was the natural, probable and proximate cause of the burning of their said house; and that by such negligent act of defendant they have been damaged three thousand dollars." They also made proper averments of ownership and possession of the burnt property, and its location and value. At the appearance term of the case, October, 1889, they filed an amended petition; and "the defendant, not being ready for trial, on account of the filing of said pleading," was given a continuance. The amendment charged that the defendant negligently erected and suffered and

permitted its depot to remain near the track, although same, except the shed thereof, was covered with shingles, and constantly exposed to fire and sparks emitted from its locomotive, and notwithstanding the fact it was fully aware of such danger, and had been time and again notified of such danger, and knew that fire had been communicated to its said depot and other buildings, time and again, from such sparks and fire; all of which, plaintiffs charge, was gross negligence, and that by reason of which negligence the depot was burned, and the fire directly communicated to their building, consumed it, etc. Thereupon a demurrer was filed to this amended petition, and also a motion to strike out such parts of it as alleged that the defendant was aware of such danger, referring to the shingle roof, and the constant exposure to fire and sparks from the locomotive, and had been notified of such danger, and knew that fire had been communicated to the depot and other buildings, time and again, from such sparks and fire. At the April term, 1890, the court sustained the demurrer to the amended petition, making no order on the motion to strike out. The plaintiffs then filed their amended petition No. 2, alleging that the defendant carelessly and negligently set fire to its depot, "which depot was dangerously combustible," in said South Somerset, by reason of which, etc. On defendant's motion, and over the plaintiffs' objection, the words, "which depot was dangerously combustible," were stricken out by the court, and a demurrer to the petition as amended was overruled. The plaintiffs' cause of action, therefore, was this: "That the defendant negligently set fire, by sparks and coals from its locomotive, to its depot, which consumed the same, and which extended to and consumed the storehouse of plaintiffs; that the defendant carelessly and negligently set fire to its depot, by reason of which it was consumed, and the fire from which depot then and there communicated to and with the plaintiffs' building, and was the proximate, probable, and natural result of the carelessness and negligence of the defendant, as aforesaid." The defendant then, by one pleading, answered both the original and amended petitions, saying that it was "not true that on the night of April 5, 1889, it negligently set fire to its depot in Somerset, Ky., by sparks and coals of fire thrown from its locomotive, or that it carelessly and negligently set fire to said depot

at the time mentioned and referred to in the petition," or that "the destruction of plaintiffs' property, referred to and described in the petition, was the proximate, probable, and natural result of its negligence, as alleged in the petition."

These were the pleadings on which the case proceeded to trial. Evidently the answer, so far as it attempted to traverse the allegations of the original petition, is, in strictness, not good for any purpose. It may mean that the company set fire to its depot by sparks and coals thrown from its locomotive, but not negligently, or it may mean that it negligently set fire to its depot, but not by sparks and coals thrown from its locomotive. The latter could hardly have been intended; and, taking it at its best, it is an admission that it set fire to its depot by sparks and coals from its locomotive, but did not do so negligently. In so far as it sought to traverse the statements of the amended petition, the answer, when liberally construed, simply says it is not true that the company negligently and carelessly set fire to its depot, manifestly admitting as a fact that it did fire the depot. Construed strictly, considering the conjunction "and," it might mean to admit that the company in fact fired the depot carelessly but not negligently, or negligently and not carelessly; but treating the words as synonyms, considered as a whole, we think the answer must be taken to be a statement that the company in fact set fire to its depot by sparks and coals thrown from its locomotive, but did not do so negligently or carelessly.

The plaintiffs' proof was to the effect that on the night in question engine No. 58 was fired up, and left a point in Somerset south of the depot a few hundred yards, pulling northwardly a number of loaded cars; that when it passed the depot it emitted sparks and coals in large quantities, which floated up, over and on the depot, and that shortly thereafter the shingle roof of the structure was seen to be on fire, the flames spread rapidly, and soon set fire to the house of plaintiffs, which was immediately across the street from the depot, — a distance of 45 feet; that the weather was warm, and there were no fires being kept in the depot building. Plaintiffs also introduced some proof conducing to show that the locomotive used was not supplied with the most improved fire screen and spark arrester; that it slipped badly

when on the track in front of the depot, as if it were overloaded; that it worked hard, and threw sparks in unreasonably large quantities. Under the permission of the court, and over the objection of the defendant, the plaintiffs proved that the building was in part covered with shingles, and that there were spaces under the eaves of the building where birds had located their nests, and that on several former occasions, in warm weather, when there were no fires in the depot, the same roof had caught on fire just after a passing train, and that the defendant knew of this, and had in fact repaired the burnt roof. The defendant's testimony showed that their engine, and its screen and spark arrester were of the most improved patterns in use or known to science; that the train was not loaded unusually heavy; that coal, and not wood, was used in firing the engine; that no sparks were emitted; there was no slipping on the track, or any derangement of the engine. Moreover, that the fire was seen inside the depot, burning more fiercely than on the outside; may have caught from the inside; that the night was cool, and there was a fire in at least one of the rooms in the building. Its chief carpenter and superintendent of buildings fully explained the construction of the depot, which was covered partly with tin and partly with shingles; and there were no spaces under the eaves where birds could find lodgment for nests. Under this state of case, the jury, after instruction, found for the plaintiffs the sum of \$2,875.

It is insisted by counsel for the appellant that although the court had by its action in sustaining the demurrer to the first amended petition, and in striking out the words, "the depot was dangerously combustible," from the second amended petition, narrowed the issue to the negligent setting on fire on defendant's depot, yet the trial was allowed to proceed, both as to the evidence and the instructions, upon the theory that plaintiffs' cause of action, as set forth in their pleadings, included or was founded on negligence growing out of the combustible character of the material in the depot, and on the assumption that fact was known to the defendant. And it must be conceded that, unless this testimony with regard to the combustible nature of the depot legitimately and properly elucidates the issue as made by the pleadings, the defendant was prejudiced by its in-

trodition. Why was it that the learned judge below, at defendant's instance, or on its motion, sustained the demurrer to the amended petition, setting up the very facts which were admitted by the court as evidence on the trial, and why strike out the words respecting the dangerous combustible character of the depot in the second amendment, when proof was immediately admitted before the jury regarding the shingle roof, and the open eaves and birds' nests of straw, etc.? Manifestly, because the setting fire to the depot negligently, or the negligence in setting fire to the depot, by the sparks, depended on the character of the building alleged to have been set afire. Negligence is the leading thought. The instrumentality or active agent of negligence was the locomotive throwing sparks, but upon what? On a tin roof, or on a clean ploughed field, or on a straw stack, or on a depot covered with straw, or on one covered with shingles, and constructed with open eaves? Clearly, the negligence in setting fire to a thing by a locomotive depends on the condition, not alone of the machine itself, but on the uses it is being put to,—the location, the surroundings; and these are matters of evidence. The combustibility of the depot was one of the circumstances bearing on the fact of whether the depot was actually fired by the sparks. Had the building been fully fireproof, would not that fact have furnished evidence against its being set on fire by the sparks? We do not pretend to decide that the mere fact that the depot was covered with shingles is of itself evidence of negligence. It is not ordinarily so. But when situated so that from some reason it is frequently fired by passing trains, and coupled with the significant proof that the defendant was aware of the combustible material of which the roof was composed, and that it had before been fired by sparks, we are fully prepared to say that if the defendant used a spark throwing locomotive in proximity to such a roof, and fired it, it would be "negligently setting fire to the depot by sparks thrown from its locomotive." With the fact conceded that the defendant fired the depot by sparks thrown from its engine; with the fact establishing that an unusual number of sparks were thrown on the night in question indicates a derangement of the spark arrester; with the knowledge and information brought home to the defendant respecting the previous fires, and the dangerous

quality of the pine and poplar shingles on the roof of the depot in dry weather,—we are of the opinion that the instructions on the subject of the construction of the depot could not have been misleading to the jury. The first instruction reads as follows: “If you believe from the evidence that the depot of the defendant at Somerset on the night of April 5, 1889, was burned by reason of the negligence of defendant in the construction of its engine, or in the construction of its depot, or in the management of its engines, and the burning of plaintiffs’ house was the natural and probable consequence, you will find for the plaintiffs; and, unless you so believe, you will find for the defendant.” The only chance for misapprehension here on the part of the jury was in considering the meaning of “negligence in the construction of its depot;” and this was not considered abstractly. No one could know what the expression would mean, or intended to mean, unless in connection with the proof; and when so considered, and the proof in the case applied to the language, it is deprived of any ambiguous or misleading feature; and this, we think, is true of the second instruction, which embraces this same expression. The depot was admittedly fired by sparks from the engine; and whether it had in fact a shingle roof, or other kind, or open or closed eaves, and in whatever way it might have been constructed, the verdict could not reasonably have been anything else, under the pleadings.

Instruction A, asked by defendant, precluded plaintiffs’ recovery if they built their house prior to the building of the depot, and knew of its exposure to fire, etc., and is not the law. “A landowner’s erection and use of a building for ordinary purposes near the track, although it is more exposed to fire than if it were at a greater distance, is not negligence.” *Pierce, R. R.* p. 435.

Instructions B and F were, in effect, given by the court. C and E, on the question of burden of proof, was wholly inapplicable; and instruction D, offered on the care necessary to be used, was substantially given in the one defining negligence.

Nor is there any doubt as to the injury being sufficiently proximate. “The ignition for which the company is liable need not take place from the very particles of fire thrown out by its engines.” If the fire spreads from the matter first ignited, the intervention of considerable space, diversity of ownership, or various

physical objects, etc., does not preclude recovery by the party injured, or affect the company's liability for its first negligent act. *Pierce, R. R.*, p. 441.

Upon the whole case, we think there has been no error prejudicial to the substantial rights of the appellant.

The judgment is therefore affirmed.*

RAILROAD COMPANIES—LIABILITY FOR SETTING FIRES.

1. Prior cases and notes.—Prior cases and notes on the subject will be found as follows: *Mills v. Chicago, etc., R. Co.*, 2 Am. R. R. and Corp. Rep. 160 and note; *St. Louis, etc., R. Co. v. Yonley*, 3 Am. R. R. and Corp. Rep. 406; *Hagen v. Chicago, etc., R. Co.*, 5 Am. R. R. and Corp. Rep. 68 and note; *McCandless v. Richmond and D. R. Co.*, 7 Am. R. R. and Corp. Rep. 366.

2. Duty and liability generally.—While railway companies are not bound to use every possible precaution which the highest scientific skill might have suggested to prevent the escape of fire from their locomotives, yet they are required to exercise a degree of care reasonably proportionate to the risks to be apprehended; and, in view of the great danger to property from fires communicated from passing locomotives, reasonable care requires that they should avail themselves of the best approved practicable appliances for the prevention of such fires. *Hoy v. Chicago, etc., R. Co.*, 46 Minn. 269; 48 N. W. Rep. 1117.

In an action to recover for hay destroyed by fire set by defendant's locomotive, a charge that in the matter of keeping their right of way free and clear of combustible materials, and in providing their locomotives with suitable spark arresters, defendants were only called upon to exercise "reasonable care, skill and diligence," states the proper rule. *Eddy v. Lafayette*, 49 Fed. Rep. 807; 1 C. C. S. 441. And see *Missouri Pac. R. Co. v. Bartlett*, 81 Tex. 42; 16 S. W. Rep. 638.

A charge that a railroad company is required to exercise the utmost care in running through a town or village where buildings are constructed of wood, and situated so near to a railroad as to be exposed to fire that may come in large quantities from the locomotive, and especially so if at the time the wind is blowing in the direction from the engine towards the buildings; and that under such circumstances the company is bound to exercise a greater degree of care than when running trains in the country, where there is no property near the track, exposed to fire; and that the degree of care which is required is proportioned to the danger to be apprehended of inflicting injury on the person or property of others—does not prescribe a greater degree of care than the circumstances stated in it called for. *Jacksonville, etc. R. Co. Peninsular Land, etc., Co.*, 27 Fla. 1, 151; 9 So. Rep. 661. A charge that railroad companies are required to furnish their locomotives with spark-arresters of the best mechanical invention and construction in general use at the time is not erroneous. *Ibid.*

*Reported in 21 S. W. Rep. 347.

3. Negligence in particular cases.—*Combustible materials on right of way.*—Negligence may be imputed to a railroad company if it allows combustible material to accumulate along its right of way in such quantity, at such places, and at such seasons as renders it liable to become ignited and cause damage to adjacent property. *Eddy v. Lafayette*, 1 C. C. A. 441; 49 Fed. Rep. 807. To same effect: *Moore v. Chicago, etc., R. Co.*, 78 Wis. 120; 47 N. W. Rep. 273; *Ft. Scott, etc., R. Co. v. Tubbs*, 47 Kan. 630; 28 Pac. Rep. 612; *Chicago, etc., R. Co. v. Gilbert*, 3 C. C. A. 264; 52 Fed. Rep. 711; *St. Louis, etc., R. Co. v. Richardson*, 47 Kan. 517; 28 Pac. Rep. 183.

Failure to move burning car from vicinity of building.—An oil-tank thirty-six feet from a side track, was burned by a fire communicated to it from a burning tar-car which had been left by defendant company standing on the side track immediately opposite the tank, and which was set on fire by sparks thrown from defendant's locomotive. The car was not moved after catching fire, although by moving it a short distance the burning of the tank would have been avoided. Held, that the case was properly submitted to the jury, as it could not be said as a matter of law that the erection of the tank at that point was contributory negligence, or that defendant was free from negligence. *Confer v. New York, etc., R. Co.*, 146 Penn. St. 31; 23 Atl. Rep. 202.

4. Contributory negligence.—An occupant of land adjoining a railway is not bound to protect a hay stack 250 yards from the line of road from sparks from passing engines, either by making fire guards or by ploughing around it. Nor is it contributory negligence to leave the land between the stack and the railroad track in its natural condition. *Gulf, etc., R. Co. v. Johnson*, 54 Fed. Rep. 474. The plaintiff is not chargeable with contributory negligence for a mere failure to take precautions against the negligence of the defendant. *Ft. Scott, etc., R. Co. v. Tubbs*, 47 Kan. 630; 28 Pac. Rep. 612. It appeared that the hay was burned in ricks while plaintiffs were making hay in the vicinity, and that the men so employed were keeping a constant lookout for fires, and had two water-wagons on the field. Held, that the court properly refused a charge based upon the assumption that they did not use "any effort to protect the hay." *Eddy v. Lafayette*, 1 C. C. A. 441; 49 Fed. Rep. 807.

A person having property adjacent to a railroad is not bound to keep his property in such a condition as to guard against the negligence of the railroad company, but every person has the right to enjoy his property in the ordinary manner; and, while one is charged with the duty of saving his property when he can do so, he is under no obligation to stand guard over it, continually watching it, to protect it from the negligence of a railroad company. *Jacksonville, etc., R. Co. v. Peninsular Land, etc., Co.* 27 Fla. 1, 151; 9 So. Rep. 661. A person has the right to construct buildings on any part of his property, and to enjoy the same, without regard to the proximity of a railroad, and such use of his property cannot be set up as contributory negligence in an action against the company for negligently setting fire to the buildings. *Ibid*, and *Confer v. New York, etc., R. Co.*, 146 Penn. St. 31; 23 Atl. Rep. 202. See also on the subject of contributory negligence. *St. Louis, etc., R. Co. v. Fire Association*, 55 Ark. 163; 18 S. W. Rep. 43; *Northern Pac. R. Co. v. Lewis*, 2 C. C. A. 446; 51 Fed. Rep. 658.

5. The question of proximate cause.—This subject received quite careful consideration in the case of Jacksonville, etc., R. Co. v. Peninsular Land, etc., Co., 27 Fla. 1, 151; 9 So. Rep, 661. In this case sparks from one of defendant's engines ignited a sidewalk which fired a building adjacent, and the flames spread to the plaintiff's property, towards which the wind was blowing at the time, from the starting point of the fire. The plaintiff recovered a judgment for \$60,000 which was affirmed by the supreme court. On the question of proximate cause the following instructions were given which were approved on appeal:

“(1.) That it is for the jury to decide whether the burning of the plaintiff's property was the direct consequence of fire caused by sparks from defendant's engine; that, if the jury believe the fire, where it originally started, was caused by sparks from the defendant's locomotive, and that said fire spread, whether from the force of the elements or the inflammable character of the buildings, and burned continuously from building to building to plaintiff's buildings, and destroyed them, and that the plaintiff either had no power to arrest the flames, or was not present, and consequently could not do anything towards arresting the flames, the jury have the right to conclude that the fire set by the defendant's engine was the proximate cause of the destruction of the plaintiff's property.

“(2.) That, if the jury believe from the evidence that the sparks from the defendant's engine caused the fire, and that the spread of the said fire could not have been arrested, or was not occasioned, by any new or intervening force, it does not matter whether the buildings belonging to the plaintiff that were destroyed were the first or the tenth. The original fire must be regarded as the proximate cause of the burning of the buildings.

“(3.) Proximate cause is what leads to and might be expected directly to produce the injury; that is, such a cause as naturally suggests itself to the mind of a prudent man as likely to cause the accident which produces the damage.

“(4.) To entitle plaintiff to recover, the defendant's negligence must be the proximate cause of the accident which produces the damage, without intervening carelessness on the part of the plaintiff, in which event he would become the author of his own misfortune, unless by ordinary care, he could not have avoided the consequences of defendant's negligence.”

Regarding these instructions the court says: “We have carefully considered the great number of authorities cited by all the counsel in their briefs, besides many others suggested by those cited, and we think that the instructions given upon this feature of the case, as above quoted, are fully sustained, not only by the numerical strength of the authorities, but by the clearness and force of the reasoning therein, and, to our minds, by the soundness of the principles therein enunciated. There seems to be no fixed rule by which accurately to apply the maxim *causa proxima, non remota, spectatur* to the circumstances of every individual case; each case necessarily depending, for the applicability of this rule, upon its own peculiar facts. But in Parsons on Contracts (volume 3, p. 180, 7th ed.) we find the clearest and most comprehensive explanation of the maxim, and a formula for its application that will furnish a test in almost

every case, in the following terse language: 'Every defendant shall be held liable for all of those consequences which might have been foreseen and expected as the result of his conduct, but not for those which he could not have foreseen, and was therefore under no moral obligation to take into his consideration.' The same author (*Id.*) says, as to the test whether a cause of damage was proximate or remote: 'Did the cause alleged produce its effect without another cause intervening, or was it made operative only through and by means of this intervening cause?'

"In *Fent v. Railway Co.*, 59 Ill. 349, a case almost on all fours with the one under consideration, in which a locomotive, passing through a village, threw out great quantities of unusually large cinders, and set on fire a warehouse near the track, from which the plaintiff's building was destroyed, 200 feet distant, the weather at the time being very dry, and the wind blowing freely, Chief Justice Lawrence rendering one of the ablest opinions upon this subject we have seen, in which many authorities are reviewed, says: 'We believe there is no other just or reasonable rule than to determine in every instance whether the loss was one which might reasonably have been anticipated from the careless setting of the fire, under all the circumstances surrounding the careless act at the time of its performance. If loss has been caused by the act, and it was, under the circumstances, a natural consequence which any reasonable person could have anticipated, then the act is a proximate cause, whether the house burned was the first or the tenth, the latter being so situated that its destruction is a consequence reasonably to be anticipated from setting the first on fire'.

"Whether the injury complained of is the proximate result of the defendant's negligent act, or whether the injury was too remote from the original cause, and was brought about by some independent intervening force or agency, are questions of fact peculiarly and exclusively within the province of the jury to determine. These propositions, though not in the same forms of expression here used, are substantially embraced in the instructions above that were given; and the soundness of them as propositions of law are fully sustained by the following authorities: *Railroad Co. v. Hope*, 80 Pa. St. 378; *Railroad Co. v. Bales*, 16 Kan. 252; *Railroad Co. v. Stanford*, 12 Kan. 354; *Clemens v. Railroad Co.*, 53 Mo. 366; *Poeppers v. Railway Co.* 67 Mo. 715; *Perry v. Railroad Co.*, 50 Cal. 578; *Railway Co. v. Krimming*, 87 Ind. 351; *Doggett v. Railroad Co.*, 78 N. C. 305; *Railroad v. Gantt*, 39 Md. 115; *Kuhn v. Jewett*, 32 N. J. Eq. 647; *Murphy v. Railway Co.*, 45 Wis. 222; *Rigby v. Hewitt*, 5 Exch. 240; *Smith v. Railway Co.*, L. R. 5 C. P. 98; *Kellogg v. Railway Co.*, 26 Wis. 223."

Where the fire was communicated to plaintiff's property by the fire from defendant's burning station, which was set on fire by sparks from its locomotive defendant is liable for the damages to plaintiff's property. *Martin v. New York, etc., R. Co.*, 62 Conn. 331; 25 Atl. Rep. 239. A fire started by defendant on its own right of way spread to plaintiff's premises, and plaintiff's cattle wandered into the fire. Held, that the injury to the cattle was a proximate result of the escape of the fire. *Chicago, etc., R. Co. v. Barnes*, 2 Ind. Ct. of App. 213; 28 N. E. Rep. 328.

A rise in the wind or a change in its direction, after the fire has started, whereby it is carried to the plaintiff's property, is not such an independent,

intervening cause as breaks the continuity between the defendant's negligence and the plaintiff's loss. *Tyler v. Ricamore*, 87 Va. 466; 12 S. E. Rep. 799; *Northern Pac. R. Co. v. Lewis*, 2 C. C. A. 446; 51 Fed. Rep. 658; *Missouri Pac. R. Co. v. Cullens*, 81 Tex. 882; 17 S. W. Rep. 19; *Gram v. Northern Pac. R. Co.*, 1 N. D. 252; 46 N. W. Rep. 972; But see, *Marvin v. Chicago, etc., R. Co.*, 79 Wis. 140; 47 N. W. Rep. 1123.

6. Of plaintiff's title to the property burned and the proof thereof.—One who, without permission, has cut cord wood from public lands, and piled it along a railroad, and who is in actual possession thereof, and engaged in selling it for his own benefit, may recover its full value, if negligently destroyed by fire from a locomotive; for the railroad company cannot justify its negligence by showing that the plaintiff was a trespasser, or question his title without connecting itself with the true title. *Northern Pac. R. Co. v. Lewis*, 2 C. C. A. 446; 51 Fed. Rep. 658.

In an action brought for burning a cranberry marsh, plaintiff's quiet and peaceable possession of the marsh, cultivating it with cranberries, constructing dams and bulkheads, and paying the taxes, is sufficient *prima facie* evidence of the title, as against the company not asserting any title to the land, to enable plaintiff to maintain the action, and to cast on defendant the burden of showing that some other person was the owner. *Moore v. Chicago, etc., R. Co.*, 78 Wis. 120; 47 N. W. Rep. 273.

Where, in an action against a railroad company for negligently causing a house to be burned, title thereto is proved by parol without objection by defendant, it cannot, after all the evidence is in, raise the question as to the competency of such proof by a motion to dismiss because title was not proved. *Fish v. Chicago, etc., R. Co.*, 81 Iowa, 280; 46 N. W. Rep. 998. To same effect, *Chicago, etc., R. Co. v. Gilbert*, 3 C. C. A. 264; 52 Fed. Rep. 711.

7. Evidence—prima facie case.—The mere emission of sparks from a railroad locomotive, or the mere setting out of fires thereby, is not *per se*, evidence of negligence upon the part of the company; but when the emission is of such character as is inconsistent with the common experience or the known efficiency of approved spark-arresters in general use, and properly used, it is evidence of negligence. The emission of sparks of unusual size, or both of unusual size and in unusual quantities, is evidence sufficient to raise the presumption of negligence, and throw upon the company the burden of removing such presumption. *Jacksonville, etc., R. Co. v. Peninsular Land, etc.*, 27 Fla. 1, 151; 9 So. Rep. 661. The mere fact that property is fired by sparks thrown from the stack of a locomotive engine is not in itself evidence of negligence, unless it appears that the spark-arrester was defective, or that the company had not adopted the most approved pattern. *Henderson v. Philadelphia, etc., R. Co.*, 144 Penn. St. 461; 22 Atl. Rep. 851. The fact that fire is communicated by a passing locomotive is held to be *prima facie* evidence of negligence in the following cases, but in some of them the question was settled by statute: *Eddy v. Lafayette*, 1 C. C. A. 441; 49 Fed. 807; *Ft. Scott, etc., R. Co. v. Tubbs*, 47 Kan. 630; 28 Pac. Rep. 612; *Johnson v. Northern Pac. R. Co.*, 1 N. D. 354; 48 N. W. 227.

8 Evidence—sufficiency of proof to make out action or defense.—In an action against a railroad company for damages caused by fire alleged

to have been started by the company's engines the only evidence of the origin of the fire was that a short time before the fire was discovered two freight trains passed the place, and that three or four hours after the fire grass and brush were found still burning within fifteen feet of the track. It was proved that the country was then very dry, and that a furious wind was blowing at the time of the fire. The defendant proved that the engines on said trains were provided with the best improved fire-arresters, which were in good condition, and that at the place where the fire occurred the engines were propelled by gravity, without the use of steam. Held, that the evidence did not justify a verdict for the plaintiff. *Missouri Pac. R. Co. v. Cullen*, 81 Tex. 382; 17 S. W. Rep. 19. Several of defendant's trains passed plaintiff's premises on the day of the fire, and defendant's testimony showed that some of its engines were in good and some in bad order. It also attempted to show that if any of them caused the fire it could have been only a particular one, which was provided with the most approved spark-arrester, and was otherwise in good order and condition. Held, that the jury was justified in finding that the fire was caused by an engine other than the one specified. *Gulf, etc., R. Co. v. Johnson*, 54 Fed. Rep. 474.

Where, in an action for negligently setting out fires and burning property, the testimony in behalf of plaintiff shows an escape of sparks of extraordinary size and in unusual quantities, or far in excess of anything likely to occur in the ordinary operation of a locomotive duly supplied with modern appliances, approved by the test of use, and properly managed by competent operatives, and the evidence in behalf of the defendant shows that the engine was in good condition, and supplied with proper appliances for arresting the escape of sparks, and was properly managed by competent operatives, which circumstances are relied on by defendant as showing due care in the operation of the locomotive, and the evidence further shows that sparks of the size and quantity indicated could not have escaped where the engine so supplied with proper appliances is properly managed, and there is a verdict in favor of the plaintiff, and, in effect, affirming negligence upon the part of the defendant, such finding will not be disturbed by an appellate court. The testimony upon the negligence *vel non* is palpably irreconcilable, and makes a question dependent entirely upon the credibility of witnesses, and peculiarly for the decision of the jury. *Jacksonville, etc., R. Co. v. Pensular Land, etc., Co.*, 27 Fla. 1, 151; So. Rep. 661.

Where the undisputed evidence shows that the fire which consumed plaintiff's property started on defendant's right of way, about one rod to leeward of the railroad track, and that such fire sprang up immediately after a train passed the point where the fire originated, and there was no other visible cause for the fire, and no other agency likely to set fires observed in that immediate locality where the fire started, held, that the evidence was sufficient to justify the jury in finding the primary fact that defendant's train threw out and started the fire in question. *Gram v. Northern Pac. R. Co.*, 1 N. D. 252; 46 N. W. Rep. 972.

In an action against a railroad company for loss or damage suffered by the plaintiff by fire caused by the defendant in the operation of its railroad, proof that the fire was so caused is, under the provisions of chapter 155 of the Laws

of 1885, *prima facie* evidence that it was so caused through the negligence of the railroad company; and it then devolves upon the railroad company to show, not only that its appliances to prevent the escape of fire were sufficient and in good order, and that its engineer was a competent and skillful engineer, but also that there was no mismanagement or negligence on the part of any of its servants or agents causing the fire. *Ft. Scott, etc., R. Co. v. Karracker*, 46 Kan. 511; 26 Pac. Rep. 1027. To same effect, *Johnson v. Northern Pac. R. Co.*, 1 N. D. 354; 48 N. W. Rep. 227.

9. Evidence—admissibility of proof of particular facts—other fires—opinion evidence.—Where property is fired by sparks from a locomotive engine, and the proof shows that it might have been fired by sparks either from an unknown engine, or from one of several engines, some of which were unknown, it is competent to show that many of the engines threw sparks, and that numerous fires had been kindled on that part of the line; but such proof should be confined exclusively to occurrences at or about the time of the fire, with such reasonable latitude as to time as to render the proof practicable. *Henderson v. Philadelphia R. Co.*, 144 Penn. St., 461; 22 Atl. Rep. 851. In an action against a railroad company for the negligent burning of buildings situated near its tracks, where the only issue was as to the origin of the fire, evidence that, on different occasions within some weeks prior to the loss, fire had escaped from engines of the company in the immediate vicinity of the property, was admissible as tending to prove the possibility, and the consequent probability, that some engine caused the fire. *Chicago, etc., R. Co. v. Gilbert*, 8 C. C. A. 264; 52 Fed. Rep. 711.

In an action against a railroad company for damages from fire set by one of its locomotives, and which had communicated to plaintiff's property, evidence that defendant had permitted the accumulation of refuse and inflammable material on its right of way for many years, and that fires had been previously set by passing locomotives, is sufficient to establish defendant's negligence. *Moore v. Chicago, etc., R. Co.*, 78 Wis. 120; 47 N. W. Rep. 273.

Evidence that the fire was caused by one of two certain locomotives, and that these and others had set other fires, both before and after the destruction of the wood, was admissible, as tending to show the possibility, and consequent probability, that a locomotive caused the fire, and to show a negligent habit of the officers and agents of the railroad company. *Northern Pac. R. Co. v. Lewis*, 2 C. C. A. 446; 51 Fed. Rep. 658. Evidence that the right of way and track, at other points in the neighborhood than that at which the fire was set out, were incumbered by dead grass and other combustible material, is admissible. *Ibid.* To same effect, *Gulf, etc., R. Co. v. Johnson*, 54 Fed. Rep. 474.

In an action against a railroad company for the burning of plaintiffs' property, which the petition alleges was caused by a spark from defendant's engine setting fire to rubbish negligently permitted to accumulate on its right of way $2\frac{1}{2}$ miles from plaintiffs' land, evidence of the dryness of the season, inflammable character of the intervening country, its connection with plaintiffs' land, and the strength and direction of the wind, is admissible. *Marvin v. Chicago R. R. Co.*, 79 Wis. 140; 47 N. W. Rep. 1123.

Where the fire destroyed plaintiff's cranberry marsh, evidence as to its natural advantages favorable to the accumulation of water from adjoining

lands, rendering the marsh more productive, is admissible on the question of damages. *Moore v. Chicago, etc., R. Co.*, 78 Wis. 120; 47 N. W. Rep. 273. Witnesses may give their opinions as to the value of plaintiff's land, and the damages resulting from the fire, without a showing that they are experts, subject to defendant's right to test their competency and their knowledge of the premises on cross-examination. *Ibid.*

10. Damages—measure of—interest—attorney's fees.—In an action to recover for the destruction of a grove of trees standing upon a farm, the measure of damages is the value which the trees added to the farm, which may be proved by showing the value of the farm with the trees standing on it, and then its value with the trees destroyed. *Hoy v. Chicago, etc. R. Co.*, 46 Minn. 269; 48 N. W. Rep. 1117. In an action for the destruction of property having a market value susceptible of easy proof, plaintiff is entitled, in addition to the value of the property at the time of its destruction, to interest thereon from that date. *Regan v. New York, etc. R. Co.* 60 Conn. 124; 22 Atl. Rep. 503; *Jacksonville, etc. R. Co. v. Peninsular Land, etc. Co.* 27 Fla. 1, 151; 9 So. Rep. 661. In *Eddy v. Lafayette*, 1 C. C. A. 441; 49 Fed. Rep. 807, it is held that the allowance of interest in such cases should be left to the discretion of the jury, citing, *Beals v. Guernsey*, 8 Johns. 446; *Thomas v. Weed*, 14 Johns. 255; *Devereux v. Burgwin*, 11 Ired. 490; *Gilpins v. Consequa*, Pet. C. C. 85; *Sedg. Dam.* (7th ed.) 189-191.

The measure of damage in cases where the property of one has been destroyed unintentionally, but by the negligence of another, where there is no element of willfulness or maliciousness in its destruction, is just compensation in money for the property destroyed; such an amount as will fully restore the loser to the same property *status* that he occupied at the time of the destruction. To arrive at the amount of such compensation, inquiry, in the absence of malice, is to be confined strictly to the ascertainment of the value of the property destroyed, with interest thereon for the retention of such value from the date of the destruction. *Jacksonville, etc., R. Co. v. Peninsular Land, etc., Co.*, 27 Fla. 1, 151; 9 So. Rep. 661.

Under the statutes of Kansas allowing the plaintiff a reasonable attorney's fee in such cases it is held that he should demand the same in his petition, and then submit the question to the court or jury trying the case upon its merits. *Ft. Scott, etc. R. Co. v. Karracker*, 46 Kan. 511; 26 Pac. Rep. 1027; *Ft. Scott, etc. R. Co. v. Tubbs*, 47 Kan. 630; 28 Pac. Rep. 612.

DAVES ET AL. v. SOUTHERN PAC. CO. ET AL.

(Supreme Court of California, *in banc*, March 27, 1893.)

1. RAILROAD COMPANIES. INJURY TO EMPLOYEE. FELLOW SERVANTS. Where the section crew of a railroad company side track a hand car with which they are working to clear the main track for an approaching train, and the section foreman, who has unlocked the switch, negligently fails to close it, and the train enters on the side track and kills a section hand, the section foreman is personally liable in damages for his death.

2. The railroad company is not liable, though the section foreman had power to employ and discharge the men working under him, since the negligence of the foreman in leaving the switch open was, notwithstanding his superior rank, the negligence of a fellow servant, within the meaning of Civil Code, § 1970, providing that an employer is not liable to his employe for losses suffered in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employe.

John D. Bicknell, for appellants. *P. C. Tonner and Hutton & Swanwick*, for respondents.

FITZGERALD, J. This action is brought by the widow and minor daughter of James Daves, deceased, to recover damages for loss suffered by his death through the alleged negligence of the defendants. The case was tried by a jury, and a general verdict rendered against the defendants, the Southern Pacific Company and Bresnahan, for \$9,000. It was also specially found by the jury that the defendant Bresnahan did not close the switch after he opened it to let the hand car upon the side track. This appeal is taken by both defendants from the judgment and the order denying their motion for a new trial.

It appears that the corporate defendant owns and operates a line of railroad between the cities of Los Angeles and Colton, in this state. That the defendant Bresnahan was its section foreman, and, as such, had charge of a portion of its track, with power to employ and discharge the men employed to work under him. That James Daves, the deceased, was a section hand employed by Bresnahan to work under him, and was engaged in the performance of his duty as such at the time of the accident which caused his death. That on the morning of the accident, and shortly before it occurred, Bresnahan, with eight of the section men, one of whom was Daves, placed a hand car on the main track for the purpose of going to a point on the section to make repairs. The hand car was then run by them some 300 feet to a switch, which was unlocked and thrown open by Bresnahan, and the hand car passed on to the side track to clear the main track for the west bound passenger train, then nearly due, and in sight. That immediately thereafter Daves was engaged in doing something about the hand car, and was under the west end of it, when the train came up, and the switch being

open, the train ran onto the side track, colliding with the hand car and killing Daves. Whether the switch was closed after it was opened by Bresnahan was a controverted point at the trial, and was submitted specially to the jury. The jury found that he did not close the switch, and, as there is evidence to support the verdict, it follows that the accident was caused by the negligence of Bresnahan, and the verdict against him cannot be disturbed.

As to whether the verdict will be permitted to stand as to the defendant corporation, depends upon whether Bresnahan and Daves were fellow servants within the meaning of section 1970 of the Civil Code, which reads as follows: "An employer is not bound to indemnify his employe for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employe." This section was construed by this court in *Collier v. Steinhart*, 51 Cal. 116, and in *McLean v. Mining Co.*, id. 255. In the latter case it appears that the defendant was engaged in blasting rock in its mine. Plaintiff was in its employ as a workman, and one Kegan was its "foreman of all work," with authority to employ and discharge the men working under him. Plaintiff was injured while at work by being struck with a rock thrown from a blast, through Kegan's negligence in failing to notify him that the blast was to be fired. The court, in the application of this section to these facts, say: "The injury to the plaintiff was caused by the negligence of Kegan, the foreman of defendant, who was a fellow servant with the plaintiff,—'another person employed by the same employer in the same general business,'—that is, the business of working the mine of the defendant, Kegan being in the blasting, and the plaintiff in the hydraulic, department of the 'general business.' The section of the Civil Code already cited declares that to such a case the rule of *respondeat superior* shall not apply, unless there has been want of ordinary care upon the part of the defendant in the selection of the culpable employe. But the fact was, as found by the court below, that there had been no such want of ordinary care on the part of the defendant;

Keegan, the 'foreman' being found to be 'skillful, competent,' and a proper person to perform the duties with which he was charged. 'The law of this state respecting this subject,' as set forth in the Code referred to, recognizes no distinction growing out of the grades of employment of the respective employes; nor does it give any effect to the circumstance that the fellow servant through whose negligence the injury came was the superior of the plaintiff in the general service in which they were in common engaged; and the alleged distinction in this respect insisted upon by the appellant's counsel, founded, as he claims, on the general principles of law and the adjudged cases, requires no examination at our hands. *Collier v. Steinhart, supra.*

In *Congrave v. Railroad Co.* 88 Cal. 360; 26 Pac. Rep. 175, it was said by Justice McFarland that section 1970 "not only restates the rule first established by judicial decision as to injury received through the negligence of a fellow servant, but it clears away to a great extent the difficulties which may have existed as to the meaning of 'fellow servants.' It declares them to be those employed 'in the same general business.'" And in citing with approval *McLean v. Mining Co., supra*, he uses the following language: "It is clear that in deciding this case the court determined that the Code swept away the distinctions which appear in some of the 'adjudged cases' on the subject of fellow servants. *Collier v. Steinhart*, 51 Cal. 116, referred to in the opinion, is still stronger to the point decided. Both of these cases were approved in *McDonald v. Hazeltine*, 53 Cal. 35, which was also a case where an employe was injured through the carelessness of a foreman. These cases were again followed and approved in *Stephens v. Doe*, 73 Cal. 26; 14 Pac. Rep. 378, where it was held that 'the foreman of a mine and a miner employed to work under his directions are fellow servants; and the owner of the mine is not liable for injuries caused to the latter through the negligence of the foreman, unless he failed to use ordinary care in the selection of the foreman.' The same doctrine was announced in *Brown v. Railroad Co.*, 72 Cal. 523; 14 Pac. Rep. 138, and *Fagundes v. Railroad Co.*, 79 Cal. 97; 21 Pac. Rep. 437."

In the *Fagundes* case, just cited, plaintiff's intestate was a laborer employed by the defendant to work on its track. The

offending servants were, respectively, the conductor of a train and a track walker, whose duty it was "to see that the track was clear of obstructions, and to signal when they existed." The deceased lost his life through the track walker's negligent interference with a switch and the conductor's negligence "in not being sufficiently on the alert to prevent" such interference. In that case the court held that, as "there is nothing in the evidence tending to show any negligence on the part of the defendant in the selection of the employes whose carelessness caused the casualty," it could not be held responsible.

The principle declared in the section of the Code referred to, and upon which the decisions in the foregoing cases rested, was settled by the highest judicial authority in this country long before the adoption of the Code, but the remarkable contrariety of judicial decisions upon the subject in other states has arisen out of the great difficulty met with in the application of it to the facts of the particular case to be decided. But in the consideration and application of this principle to the case before us we do not propose to enter into a discussion of the relation which the section foreman of a railroad corporation sustains towards his employer with respect to the duties pertaining to his employment, except in so far as the subject of such relation is necessary to be considered in connection with the character of the particular act itself by which the accident was caused, for the purpose of determining whether such act was a personal duty which the defendant corporation owed to the deceased as its employe, or whether the loss caused by the act complained of was "in consequence of the negligence of another person employed by the same employer in the same general business." This must be determined, not from the grade or rank of the section foreman, but from the character of the act performed by him. If the act was one which it was the duty of the employer to perform towards its servants, and one of them negligently performed it to the injury of another servant in the same common employment, then the offending servant, in the performance of such duty acted as the representative or agent of his employer, for which the employer is responsible; if it was not, then they were fellow servants, and the offending servant is alone responsible.

The duties which a railroad corporation owes to its servants, and which it is required to perform, are to furnish suitable machinery and appliances by which the service is to be performed, and to keep them in repair and order; to exercise ordinary care in the selection and retention of sufficient and competent servants to properly conduct the business in which the servant is employed, and to make such provisions for the safety of employes as will reasonably protect them against the dangers incident to their employment. The performance of these duties cannot be shifted by it to a servant, so as to avoid responsibility for injury caused to another servant by its omission; nor is their negligent performance one of the ordinary risks of the service impliedly assumed by the employe by his contract of employment. Was, then, the act or omission which caused the injury a personal duty which the defendant corporation owed to the deceased while he was engaged in the performance of his duties as its employe? If it was, and the deceased was not at fault, then the corporate defendant is liable; otherwise not. It appears that Bresnahan, through whose negligence it is clear that Daves was killed, was the section foreman of the defendant corporation, and, as such, had charge of about eight miles of its track, including that portion of it where the accident occurred. It was his duty to keep the track and switches in repair and order, and free from obstructions, so as to practically insure the safety of trains passing over it. He had undisputed control of the section men employed to work under him, and was vested with authority to employ and discharge them. As to whether he was the representative of the employer, with respect to the performance of these duties, we are not called upon, in view of the facts, to decide, for the reason that the act which caused the injury out of which this action arises, is clearly not embraced within them. It is not claimed that the corporation did not exercise ordinary care in the selection of Bresnahan as foreman, or that the switch which he negligently left open, and by which the loss was suffered, was unsuitable or defective. But it is insisted that the corporate defendant violated a duty which it owed to Daves by not providing him with a reasonably safe place to perform his work; that the place was not safe because "a train was coming when the switch was open," in consequence of which he lost his life. The place,

as we have seen, where the accident occurred, was the side track on which the hand car had been run from the main track to avoid the passenger train, then almost due, and in sight. The place was, of itself, in the first instance, a reasonably safe one, and was resorted to, under the circumstances, for that very reason. The track and switches on Bresnahan's section, in so far as anything appears to the contrary, were in good condition, and so was the hand car, with the exception of some disarrangement in the brake, which, however, had nothing to do with the injury. The servants were sufficient in number, and competent for the purposes of the employment. It is plain, therefore, that the death of Daves was not caused by the violation of any duty which the master owed to him, but by the negligent act of Bresnahan, who, with respect to the performance of that particular act, was the fellow servant of Daves. If a brakeman or trainman who, it appears were intrusted with keys to the switch, or one of the section men, had been guilty of the negligent act complained of, we do not think that it would be seriously contended here that such act was the act of the master; and such would undoubtedly be the case if a switchman had been regularly employed to attend that switch, and he negligently performed the act referred to, instead of Bresnahan, for a switchman, in using and operating a switch, is no more the agent of the master than is an engineer who is engaged in running a locomotive. It is the duty of the master to provide a suitable switch and competent servants for its operation. When he has done this his duty is at an end, and his liability ceases. The keeping of it in position and its use and operation is a duty belonging to the servant, the negligent performance of which, to the injury of another servant employed in the same general business, is a risk which the injured servant assumed when he took the employment, and for which the master is not liable. It is not denied that Bresnahan was a competent and experienced foreman, so that there was no neglect of duty by the master with respect to his selection. But the negligent act complained of was performed by him in the course of the work upon which they were all engaged, and by one who, so far as the particular act was concerned, was clearly not the agent of the master, but the fellow-servant of Daves. The place was, therefore, made

dangerous by the culpable negligence of a fellow-servant, and this, notwithstanding the fact that his grade or rank at the time happened to be superior to that of Daves. It, therefore, follows, that the consequences flowing from a place made unsafe under such circumstances are not chargeable to the master. The duty violated did not relate to the place of work, but to the negligent use of an appliance or instrumentality which was proper and suitable for the purpose for which it was furnished by the master, and such use of it was simply a detail of the work or management of the business; therefore a duty of the servant, which he, and not the master, was bound to perform. From these views it is clear that the negligence of Bresnahan in leaving the switch open in the manner and with the unfortunate result indicated was, notwithstanding his superior rank, the negligence of a fellow-servant, within the meaning of section 1970 of the Civil Code; therefore a risk impliedly assumed by Daves when he took the employment, for which the corporate defendant cannot be held responsible. As this disposes of the controlling question in the case, the others discussed in relation to the instructions are not necessary to be considered. Let the judgment and order be affirmed as to the defendant Bresnahan, and reversed as to the corporate defendant, and the cause remanded for a new trial.

We concur, BEATTY, C. J.; DE HAVEN, J.; MCFARLAND, J.; HARRISON, J.; GAROUTTE, J.; PATERSON, J.*

1. Railroad employes—fellow servants—foreman or vice-principal.—See *Baltimore & O. R. Co. v. Baugh*, *post*; *Bloyd v. St. Louis, etc., R. Co.*, and note, *post*.

2. Fellow servant question—former notes and cases.—*Louisville, etc., R. Co. v. Petty*, 2 Am. R. R. & Corp. Rep. 169 and note; *Miller v. Southern Pac. R. Co.*, 4 Am. R. R. & Corp. Rep. 1, and note; *Dayharsh v. Hannibal & St. J. R. Co.*, 4 Am. R. R. & Corp. Rep. 289; *Ford v. Lake Shore, etc., R. Co.*, 4 Am. R. R. & Corp. Rep. 885 and note; *Justice v. Pennsylvania Co.*, 6 Am. R. R. & Corp. Rep. 56, and note. See also the next two cases and notes.

*Reported in 82 Pac. Rep. 706.

BALTIMORE & OHIO R. CO. v. BAUGH

(Supreme Court of the United States, May 1, 1893.)

1. RAILROAD COMPANIES. INJURY TO EMPLOYEE. DECISIONS OF STATE SUPREME COURT NOT LAWS OF THE STATE. Decisions by the highest court of the state are not "laws" of the state, within the meaning of Rev. St. § 721, which provides that, in the absence of federal legislation, "the laws of the several states" shall be regarded as rules of decision in actions of law in the federal courts, in cases where they apply.

2. STATE DECISIONS AS TO WHO ARE FELLOW SERVANTS NOT CONTROLLING IN THE FEDERAL COURTS. The question whether the engineer and fireman of a locomotive are fellow servants, so as to preclude the fireman from recovering damages against the company for personal injuries caused by the engineer's negligence, is a question of general law, as to which the federal courts are not controlled by state decisions, but are free to exercise an independent judgment.

3. GENERAL CRITERION FOR DETERMINING WHO ARE FELLOW SERVANTS.— In determining the liability of a master to his servant for injuries caused by the negligence of another servant, the question does not turn merely on the matter of subordination and control, but rather on the character of the alleged negligent act. If that act is done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master, irrespective of the gradations of service as between the servants themselves. If the act is not one in the discharge of such positive duty, then there should be some personal wrong on the part of the master before he can be held liable.

4. POSITIVE DUTIES OF THE MASTER TO THE SERVANT WITH RESPECT TO WHICH HE IS LIABLE FOR NEGLIGENCE, THOUGH THEIR PERFORMANCE IS ENTRUSTED TO CO-EMPLOYEES. It is the positive duty of the master to take fair and reasonable precautions to surround his employe with fit and careful co-workers, and to have the place in which, and the tools and machinery with which, he is to work reasonably safe and sufficient, and for negligence in the discharge of these duties, whereby the servant is injured, the master will be liable, whether he undertakes to perform these duties in person or entrusts them to others who are employed by him.

5. THE ENGINEER AND FIREMAN OF A LOCOMOTIVE ARE FELLOW SERVANTS. An engineer in charge of a locomotive, which is running detached from any train, cannot be regarded as in control of a department of the company's business, so as to render him a vice principal in his relation to the fireman of the locomotive; but the two are fellow servants, although the company's rules declare that under such circumstances the engineer shall also be regarded as a conductor.

JOHN BAUGH, defendant in error, was employed as a fireman on a locomotive of the plaintiff in error, and while so employed was injured, as is claimed, through the negligence of the engineer in charge thereof. He commenced a suit to recover for

these injuries in the circuit court of the United States for the southern district of Ohio.

The circumstances of the injury are these: The locomotive was manned by one Hite, as engineer, and Baugh, as fireman, and was what is called in the testimony a "helper." On May 4, 1885, it left Bellaire, Ohio, attached to a freight train, which it helped to the top of the grade about 20 miles west of that point.

At the top of the grade the helper was detached, and then returned alone to Bellaire. There were two ways in which it could return, in conformity to the rules of the company: one, on the special orders of the train dispatcher at Newark, and the other, by following some regular scheduled train, carrying signals to notify trains coming in the opposite direction that the helper was following it. This method was called in the testimony "flagging back." On the day in question, without special orders, and not following any scheduled train, the helper started back for Bellaire, and on the way collided with a regular local train, and in the collision Baugh was injured. Baugh had been in the employ of the railroad company about a year, and had been fireman about six months, and had run on the helper two trips a day, about two months. He knew that the helper had to keep out of the way of the trains, and was familiar with the method of flagging back.

No testimony was offered by the defendant, and at the close of plaintiff's testimony the defendant asked the court to direct a nonsuit, which motion was overruled, to which ruling an exception was duly taken. In its charge to the jury the court gave this instruction: "If the injury results from negligence or carelessness on the part of one so placed in authority over the employe of the company, who is injured, as to direct and control that employe, then the company is liable." To which instruction an exception was duly taken. The jury returned a verdict for the plaintiff for \$6,750, and upon this verdict judgment was entered, to reverse which the railroad company sued out a writ of error from this court.

John K. Cowen, J. H. Collins, and Hugh L. Bond, Jr., for plaintiff in error. *L. Danford* for defendant in error.

Mr. Justice BREWER, after stating the facts in the foregoing language, delivered the opinion of the court.

The single question presented for our determination is whether the engineer and fireman of this locomotive, running alone and without any train attached, were fellow servants of the company, so as to preclude the latter from recovering from the company for injuries caused by the negligence of the former.

This is not a question of local law, to be settled by an examination merely of the decisions of the supreme court of Ohio, the state in which the cause of action arose, and in which the suit was brought, but rather one of general law, to be determined by a reference to all the authorities, and a consideration of the principles underlying the relations of master and servant.

The question as to what is a matter of local, and what of general, law, and the extent to which in the latter this court should follow the decisions of the state courts, has been often presented. The unvarying rule is that in matters of the latter class this court, while leaning towards an agreement with the views of the state courts, always exercises an independent judgment; and as unvarying has been the course of decision that the question of the responsibility of a railroad corporation for injuries caused to or by its servants is one of general law. In the case of *Swift v. Tyson*, 16 Pet. 1, the first proposition was considered at length. On page 18 it is thus stated: "But, admitting the doctrine to be fully settled in New York, it remains to be considered whether it is obligatory upon this court if it differs from the principles established in the general commercial law. It is observable that the courts of New York do not found their decisions upon this point upon any local statute, or positive, fixed, or ancient local usage, but they deduce the doctrine from the general principles of commercial law. It is, however, contended that the thirty-fourth section of the judiciary act of 1789, (c. 20,) furnishes a rule obligatory upon this court to follow the decisions of the state tribunals in all cases to which they apply. That section provides 'that the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply.' In order to maintain the argument, it is essential, therefore, to hold that the word

'laws,' in this section, includes within the scope of its meaning the decisions of the local tribunals. In the ordinary use of language it will hardly be contended that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not of themselves laws. They are often re-examined, reversed, and qualified by the courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect. The laws of a state are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long-established local customs having the force of laws. In all the various cases which have hitherto come before us for decision, this court have uniformly supposed that the true interpretation of the thirty-fourth section limited its application to state laws strictly local; that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character."

Notwithstanding the interpretation placed by this decision upon the thirty-fourth section of the judiciary act of 1789, congress has never amended that section; so it must be taken as clear that the construction thus placed is the true construction, and acceptable to the legislative as well as to the judicial branch of the government. This decision was in 1842. Forty years thereafter, in *Burgess v. Seligman*, 107 U. S. 20; 2 Sup. Ct. Rep. 10, the matter was again fully considered, and it was said by Mr. Justice Bradley, on pages 33 and 34, 107 U. S., and pages 21 and 22, 2 Sup. Ct. Rep., that "the federal courts have an independent jurisdiction in the administration of state laws, co-ordinate with and not subordinate to that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws."

The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and

action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate, and the construction of state constitutions and statutes. Such established rules are always regarded by the federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the federal courts to exercise their own judgment, as they always do in reference to the doctrines of commercial law and general jurisprudence. * * * As, however, the very object of giving to the national courts jurisdiction to administer the laws of the states in controversies between citizens of different states was to institute independent tribunals, which, it might be supposed, would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication. As this matter has received our special consideration, we have endeavored thus briefly to state our views with distinctness, in order to obviate any misapprehensions that may arise from language and expressions used in previous decisions. The principal cases bearing upon the subject are referred to in the note, but it is not deemed necessary to discuss them in detail." And in the note referred to over fifty cases are cited, in which the proposition had been in terms stated or in fact recognized. Since the case of *Burgess v. Seligman* the same proposition has been again and again affirmed.

Whatever differences of opinion may have been expressed have not been on the question whether a matter of general law should be settled by the independent judgment of this court, rather than through an adherence to the decisions of the state courts, but upon the other question, whether a given matter is one of local or of general law. Thus in the case of *Bucher v. Railroad Co.*, 125 U. S. 555; 8 Sup. Ct. Rep. 974, these facts appeared: A statute of Massachusetts forbade travel on the Lord's day, except for necessity or charity, under penalty of a fine not exceeding \$10. The plaintiff, while riding in the cars of the defendant in violation of that statute, was injured through its negligence. The defendant pleaded his violation of this statute as a bar to any recovery, citing repeated decisions of the highest court

of the state sustaining such a defense. This court followed those decisions. It is true, as said in the opinion, that there was no dispute about the meaning of the language used by the legislature, so this court was not following the construction placed upon the statute by the Massachusetts court, but only those decisions as to its effect. And yet, from that opinion two of the justices dissented, holding that, notwithstanding it was a dispute as to the effect of a state statute, it was still a question of general law.

Again in the case of *Detroit v. Osborne*, 135 U. S. 492; 10 Sup. Ct. Rep. 1012, the plaintiff was injured while walking in one of the streets of Detroit, through a defect in the sidewalk. The supreme court of Michigan had held that the duty resting upon the city, of keeping its streets in repair, was a duty to the public, and not to private individuals, the mere neglect to which was a nonfeasance only, for which no private action for damages arose.

This court followed that ruling, although conceding that it was not in harmony with the general opinion, nor in accordance with the views of this court, and this was done on the ground that the question was one of a purely local nature. This quotation was made from the opinion in *Claiborne Co. v. Brooks*, 111 U. S. 400, 410; 4 Sup. Ct. Rep. 489, as fully expressing the reasons for so following the rulings of the Michigan court: "It is undoubtedly a question of local policy with each state what shall be the extent and character of the powers which its political and municipal organizations shall possess, and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States; for it is a question that relates to the internal constitution of the body politic of the state." Observations of a similar nature are pertinent to other cases, in which this court has felt itself constrained to yield its own judgment to the decisions of the state courts.

Again, according to the decisions of this court, it is not open to doubt that the responsibility of a railroad company to its employes is a matter of general law. In *Railroad Co. v. Lockwood*, 17 Wall. 357, 368, the question was as to the extent to which a common carrier could stipulate for exemption from responsibility for the negligence of himself or his servants, and notwithstanding there were decisions of the courts of New York thereon, the state in which the cause of action arose, this court held that

it was not bound by them, and that in a case involving a matter of such importance to the whole country it was its duty to proceed in the exercise of an independent judgment. In *Hough v. Railway Co.*, 100 U. S. 213, was presented the liability of a company to its servants for injuries caused by negligence, and Mr. Justice Harlan, on page 226, thus expressed the views of the entire court: "Our attention has been called to two cases determined in the supreme court of Texas, and which it is urged, sustain the principles announced in the court below. After a careful consideration of those cases, we are of opinion that they do not necessarily conflict with the conclusions we have reached. Be this as it may, the questions before us, in the absence of statutory regulations by the state in which the cause of action arose, depend upon principles of general law, and in their determination we are not required to follow the decisions of the state courts." In *Myrick v. Railroad Co.*, 107 U. S. 102, 108; 1 Sup. Ct. Rep. 425, the question was whether a bill of lading issued by a railroad company, whereby the company agreed to carry cattle beyond its own lien to the place named for final delivery, was a through contract. The ticket or bill of lading was issued in Illinois, and the rulings of the supreme court of that state, as to the effect of such a ticket or bill of lading, were claimed to be conclusive; but this court declined to follow them, and in the exercise of its own judgment placed a different construction upon the contract. And in the recent case of *Railway Co. v. Prentice*, 147 U. S. 101, 106; 13 Sup. Ct. Rep. 261, where the question arose as to the right to recover from the railway company punitive damages for the wanton and oppressive conduct of one of its conductors towards a passenger, it was said: "This question, like others affecting the liability of a railroad corporation as a common carrier of goods or passengers, such as its right to contract for exemption from responsibility for its own negligence, or its liability beyond its own line, or its liability to one of its servants for the act of another person in its employment, is a question, not of local law, but of general jurisprudence upon which this court, in the absence of express statute regulating the subject, will exercise its own judgment, uncontrolled by the decisions of the courts of the several states."

Not only that, but in the cases of *Railway Co. v. McDaniels*, 107 U. S. 454; 2 Sup. Ct. Rep. 932, a case arising in the state of

Indiana ; *Randall v. Railroad Co.*, 109 U. S. 478 ; 3 Sup. Ct. Rep. 322, arising in West Virginia ; and *Railroad Co. v. Ross*, 112 U. S. 377 ; 5 Sup. Ct. Rep. 184 coming, from Minnesota,—all three cases being actions by employes to recover damages against railroad companies for personal injuries—the question of the liability of the company was discussed as one of general law, and no reference made to the decisions of the state in which the injuries took place. Indeed, in the last case, the instructions given by the circuit judge, which was sustained by this court, was in direct opposition to the rulings of the supreme court of Minnesota. Thus in *Brown v. Railroad Co.*, 27 Minn. 162 ; 6 N. W. Rep. 484, a case called to the attention of this court, that court held that “a master is not liable to one servant for injuries caused by the negligence of a co-servant in the same common employment,” and “that the negligent servant is superior in authority, or an overseer of the one injured, does not take the case out of this rule.” And in the opinion, on page 165, 27 Minn., and page 486, 6 N. W. Rep., it is said : “It is upon this point that the authorities disagree. Some courts, the supreme court of Ohio being the leading one, hold that where the injured servant is a subordinate to him whose negligence causes the injury, they are not ‘fellow servants,’ and the master is liable. On the other hand, the great majority of courts, both in this country and in England, hold that mere difference in grade of employment, or in authority, with respect to each other, does not remove them from the class of fellow servants as regards the liability of the master for injuries to one caused by negligence of the other.”

The same doctrine was announced in *Brown v. Railway Co.*, 31 Minn. 553 ; 18 N. W. Rep. 834, and *Fraker v. Railway Co.*, 32 Minn. 54 ; 19 N. W. Rep. 349, both decided before the *Ross* case, and reaffirmed since in *Gonsior v. Railway Co.*, 36 Minn. 385 ; 31 N. W. Rep. 515. Indeed, in all the various cases in this court, affecting the relations of railroad companies to their employes, it has either been directly affirmed that the question presented was one of general law, or else the discussion has proceeded upon the assumption that such was the fact.

An examination of the opinions in the cases in the Ohio supreme court, which are claimed to be authoritative here, discloses that they proceed not upon any statute, or upon any custom or

usage, or, indeed, upon anything of a local nature, but simply announce the views of that court upon the question as one of general law. We agree with that court, in holding it to be a question of general law, although we differ from it, as to what the rule is by that law. Indeed, the Ohio court is not wholly satisfied with that doctrine, as appears from the cases of *Whaalan v. Railroad Co.*, 8 Ohio St. 249, and *Railway Co. v. Devinney*, 17 Ohio St. 197. In the last case it disagrees with the conclusions reached by this court, in the case of *Railroad Co. v. Ross*, *supra*, and holds that a conductor of a train is not always to be regarded as a vice-principal or representative of the company. In that case, a brakeman on one train was injured through the negligence of the conductor of another, and they were held to be fellow servants, and the latter not a vice principal or representative of the company, for whose negligence it was responsible. The opinion in that case is significant as showing that the question was regarded as one of common or general law; that the ordinary rule is in accordance with the views we have reached in this case; and that the Ohio doctrine is confessedly an exception. We quote from it as follows: "The true general rule is, and so it must be, that, when men are employed for the prosecution of a lawful but hazardous business, they assume the hazards of such employment arising from the negligence of co-employees, and stipulate for compensation according to their estimate of such hazards; subject, however, to this exception, that the master is liable for such injuries as accrued to the servant from the negligence of a fellow servant in the selection of whom the master has been culpably negligent; and to this we in Ohio have added the further exception of a case where the servant injured is subordinate to, and acting under the orders of, the culpable fellow servant. For the reasoning on which the decisions establishing this exception are based, the members of this court, as now constituted, are not responsible; nor are we at all bound to carry out their logic to its ultimate consequences. In subsequent cases, strictly analogous in their facts, those decisions will doubtless be accepted as authoritative; but the case now before us does not require us to review them. In adding this last-named exception to the rule elsewhere generally established, we have already diverged from the general current of judicial decision elsewhere. A majority of the court are unwilling to increase

the divergency; doubting, as we do, the wisdom of such a step, and being unwilling to assume the responsibility of what would savor so strongly of judicial legislation."

But, passing beyond the matter of authorities, the question is essentially one of general law. It does not depend upon any statute; it does not spring from any local usage or custom; there is in it no rule of property, but it rests upon those considerations of right and justice which have been gathered into the great body of the rules and principles known as the "common law." There is no question as to the power of the states to legislate and change the rules of the common law in this respect as in others; but in the absence of such legislation the question is one determinable only by the general principles of that law. Further than that, it is a question in which the nation as a whole is interested. It enters into the commerce of the country. Commerce between the states is a matter of national regulation, and to establish it as such was one of the causes which led to the adoption of our constitution.

To-day, the volume of interstate commerce far exceeds the anticipation of those who framed this constitution, and the main channels through which this interstate commerce passes are the railroads of the country. Congress has legislated in respect to this commerce not merely by the interstate commerce act and its amendments (24 Stat. 379), but also by an act passed at the last session, requiring the use of automatic couplers on freight cars. Pub. Acts, c. 113. The lines of this very plaintiff in error extend into half a dozen or more states, and its trains are largely employed in interstate commerce. As it passes from state to state, must the rights, obligations, and duties subsisting between it and its employes change at every state line? If to a train running from Baltimore to Chicago it should, within the limit of the state of Ohio, attach a car for a distance only within that state, ought the law controlling the relation of brakemen on that car to the company to be different from that subsisting between the brakemen on the through cars and the company? Whatever may be accomplished by statute,—and of that we have now nothing to say,—it is obvious that the relations between the company and employe are not in any sense of the term local in character, but are of a general nature, and to be determined by the general rules of the common law. But the question is not local, but general. It is

also one of the vexed questions of the law, and perhaps there is no one matter upon which there are more conflicting and irreconcilable decisions in the various courts of the land than the one as to what is the test of a common service, such as to relieve the master from liability for the injury of one servant through the negligence of another. While a review of all these cases is impossible, it may not be amiss to notice some, and to point out what are significant factors in such a question.

Counsel for the defendant in error rely principally upon the case of *Railroad Co. v. Ross*, 112 U. S. 377 ; 5 Sup. Ct. Rep. 184, taken in connection with this portion of rule No. 10 of the company: "Whenever a train is run without a conductor, the engine man thereof will also be regarded as conductor, and will act accordingly." The *Ross* case, as it is commonly known, decided that "a conductor of a railroad train, who has a right to command the movements of a train and control the persons employed upon it, represents the company while performing those duties, and does not bear the relation of fellow servant to the engineer and other employes on the train." The argument is a short one: The conductor of a train represents the company, and is not a fellow servant with his subordinates on the train. The rule of the company provides that, when there is no conductor the engineer shall be regarded as a conductor. Therefore, in such case he represents the company, and is likewise not a fellow servant with his subordinates. But this gives a potency to the rule of the company which it does not possess. The inquiry must always be directed to the real powers and duties of the official, and not simply to the name given to the office. The regulations of a company cannot make the conductor a fellow servant with his subordinates, and thus overrule the law announced in the *Ross* case. Neither can it, by calling some one else a conductor, bring a case within the scope of the rule there laid down. In other words, the law is not shifted backward and forward by the mere regulations of the company, but applies generally, irrespective of all such regulations. There is a principle underlying the decision in that case, and the question always is as to the applicability of that principle to the given state of facts.

What was the *Ross* case, and what was decided therein? The instruction given on the trial in the circuit court, which was made

the principal ground of challenge, was in these words: "It is very clear, I think, that if the company sees fit to place one of its employes under the control and direction of another, that then the two are not fellow servants engaged in the same common employment, within the meaning of the rule of law of which I am speaking." The language of that instruction, it will be perceived, is very like that of the one here complained of, and, if this court had approved that instruction as a general rule of law, it might well be said that that was sufficient authority for sustaining this, and affirming the judgment. But though the question was fairly before the court, it did not attempt to approve the instruction generally, but simply held that it was not erroneous as applied to the facts of that case. This is evident from this language, found in the latter part of the opinion, and which is used in summing up the conclusions of the court: "We agree with them in holding—and the present case requires no further decision—that the conductor of a railway train, who commands its movements, directs when it shall start, at what stations it shall stop, at what speed it shall run, and has the general management of it, and control over the persons employed upon it represents the company, and, therefore, that, for injuries resulting from his negligent acts, the company is responsible. If such a conductor does not represent the company, then the train is operated without any representative of its owner. If, now, we apply these views of the relation of the conductor of a railway train to the company, and to the subordinates under him on the train, the objections urged to the charge of the court will be readily disposed of. Its language in some sentences may be open to verbal criticism, but its purport touching the liability of the company is that the conductor and engineer, though both employes, were not fellow servants in the sense in which that term is used in the decisions." It is also clear from an examination of the reasoning running through the opinion, for there is nowhere an argument to show that the mere fact that one servant is given control over another destroys the relation of fellow servants. After stating the general rule, that a servant entering into the service assumes the ordinary risks of such employment, and, among them, the risk of injuries caused through the negligence of a fellow servant, and after referring to

some cases on the general question, and saying that it was unnecessary to lay down any rule which would determine in all cases what is to be deemed a common employment, it turns to that which was recognized as the controlling fact in the case, to wit, the single and absolute control which the conductor has over the management of a train, as a separate branch of the company's business, and says: "There is, in our judgment, a clear distinction to be made in their relation to their common principal, between servants of a corporation, exercising no supervision over others engaged with them in the same employment, and agents of the corporation, clothed with the control and management of a distinct department, in which their duty is entirely that of direction and superintendence. * * * We know from the manner in which railways are operated that, subject to the general rules and orders of the directors of the companies, the conductor has entire control and management of the train to which he is assigned. He directs when it shall start, at what speed it shall run, at what stations it shall stop, and for what length of time, and everything essential to its successful movements, and all persons employed on it are subject to his orders. In no proper sense of the term is he a fellow servant with the fireman, the brakemen, the porters, and the engineer. The latter are fellow servants in the running of the train under his direction; as to them and the train, he stands in the place of and represents the corporation." And quotes from Wharton's Law of Negligence, (section 232a) "The true view is that, as corporations can act only through superintending officers, the negligences of those officers, with respect to other servants, are the negligences of the corporation." And also from *Malone v. Hathaway*, 64 N. Y. 5, 12: "Corporations necessarily acting by and through agents, those having the superintendence of various departments, with delegated authority to employ and discharge laborers and employes, provide machinery and material for the service of the corporation, and generally direct and control under general powers and instructions from the directors, may well be regarded as the representatives of the corporation, charged with the performance of its duty, exercising the discretion ordinarily exercised by principals, and, within the limits of the delegated authority, the acting principal."

The court, therefore, did not hold that it was universally true

that, when one servant has control over another, they cease to be fellow servants within the rule of the master's exemption from liability, but did hold that an instruction couched in such general language was not erroneous when applied to the case of a conductor having exclusive control of a train in relation to other employes of the company acting under him on the same train. The conductor was, in the language of the opinion, "clothed with the control and management of a distinct department;" he was "a superintending officer," as described by Mr. Wharton; he had "the superintendence of a department," as suggested by the New York court of appeals.

And this rule is one frequently recognized. Indeed, where the master is a corporation, there can be no negligence on the part of the master except it also be that of some agent or servant, for a corporation only acts through agents. The directors are the managing agents; their negligence must be adjudged the negligence of the corporation, although they are simply agents. So when they place the entire management of the corporation in the hands of a general superintendent, such general superintendent, though himself only an agent, is almost universally recognized as the representative of the corporation, the master, and his negligence as that of the master. And it is only carrying the same principle a little further, and with reasonable application, when it is held that, if the business of the master and employer becomes so vast and diversified that it naturally separates itself into departments of service, the individuals placed by him in charge of those separate branches and departments of service, and given entire and absolute control therein, are properly to be considered, with respect to employes under them, vice principals, representatives of the master as fully and as completely as if the entire business of the master was by him placed under charge of one superintendent. It was this proposition which the court applied in the Ross case, holding that the conductor of a train has the control and management of a distinct department. But this rule can only be fairly applied when the different branches or departments of service are in and of themselves separate and distinct. Thus, between the law department of a railway corporation and the operating department there is a natural and distinct separation, one which makes the two departments like two independent kinds of business, in

which the one employer and master is engaged. So, oftentimes there is in the affairs of such corporation what may be called a manufacturing or repair department, and another strictly operating department; these two departments are, in their relations to each other, as distinct and separate as though the work of each was carried on by a separate corporation. And from this natural separation flows the rule that he who is placed in charge of such separate branch of the service, who alone superintends and has the control of it, is as to it in the place of the master. But this is a very different proposition from that which affirms that each separate piece of work in one of these branches of service is a distinct department, and gives to the individual having control of that piece of work the position of vice principal or representative of the master. Even the conclusion announced in the Ross case was not reached by a unanimous court, four of its members being of opinion that it was carrying the thought of a distinct department too far to hold it applicable to the management of a single train.

The truth is, the various employes of one of these large corporations are not graded like steps in a staircase, those on each step being as to those on the step below in the relation of masters, and not of fellow servants, and only those on the same steps fellow servants, because not subject to any control by one over the other. *Prima facie*, all who enter into the employ of a single master are engaged in a common service, and are fellow servants, and some other line of demarcation than that of control must exist to destroy the relation of fellow servants. All enter into the service of the same master, to further his interests in the one enterprise; each knows when entering into that service that there is some risk of injury through the negligence of other employes, and that risk, which he knows exists, he assumes in entering into the employment. Thus, in the opinion in the Ross case, page 382, 112 U. S., and page 186, 5 Sup. Ct. Rep., it was said: "Having been engaged for the performance of specified services, he takes upon himself the ordinary risks incident thereto. As a consequence, if he suffers by exposure to them, he cannot recover compensation from his employer. The obvious reason for this exemption is that he has, or, in law, is supposed to have, them in contemplation when he engages in the service, and that his compensation is arranged

accordingly. He cannot, in reason, complain if he suffers from a risk which he has voluntarily assumed, and for the assumption of which he is paid."

The danger from the negligence of one specially in charge of the particular work is as obvious and as great as from that of those who are simply co-workers with him in it. Each is equally with the other an ordinary risk of the employment. If he is paid for the one, he is paid for the other; if he assumes the one he assumes the other. Therefore, so far as the matter of the master's exemption from liability depends upon whether the negligence is one of the ordinary risks of the employment, and, thus assumed by the employe, it includes all co-workers to the same end, whether in control or not. But if the fact that the risk is or is not obvious does not control, what test or rule is there which determines? Rightfully this: there must be some personal wrong on the part of the master, some breach of positive duty on his part. If he discharge all that may be called positive duty, and is himself guilty of no neglect, it would seem as though he was absolved from all responsibility, and that the party who caused the injury should be himself alone responsible. It may be said that this is only passing from one difficulty to another, as it leaves still to be settled what is positive duty and what is personal neglect; and yet, if we analyze these matters a little, there will appear less difficulty in the question. Obviously, a breach of positive duty is personal neglect; and the question in any given case is, therefore, what is the positive duty of the master? He certainly owes the duty of taking fair and reasonable precautions to surround his employe with fit and careful co-workers, and the employe has a right to rely upon his discharge of this duty. If the master is careless in the matter of employing a servant, it is his personal neglect; and if without proper care in inquiring as to his competency he does employ an incompetent person, the fact that he has an incompetent, and, therefore, an improper, employe is a matter of his personal wrong, and owing to his personal neglect. And if the negligence of this incompetent servant works injury to a co-servant, is it not obvious that the master's omission of duty enters directly and properly into the question of responsibility? If, on the other hand, the master has taken all reasonable precautions to inquire into the competency of one proposing to enter into his ser-

vice, and as the result of such reasonable inquiry is satisfied that the employe is fit and competent, can it be said that the master has neglected anything, that he has omitted any personal duty? and this, notwithstanding that, after the servant has been employed, it shall be disclosed that he was incompetent and unfit? If he has done all that reasonable care requires to inquire into the competency of his servant, is any neglect imputable to him? No human inquiry, no possible precaution, is sufficient to absolutely determine in advance whether a party under certain exigencies will or will not do a negligent act. So it is not possible for the master, take whatsoever pains he may, to secure employes who will never be guilty of any negligence. Indeed, is there any man who does not sometimes do a negligent act? Neither is it possible for the master, with any ordinary and reasonable care, always to secure competent and fit servants. He may be mistaken, notwithstanding the reasonable precautions he has taken. Therefore, that a servant proves to be unfit and incompetent, or that in any given exigency he is guilty of a negligent act resulting in injury to a fellow servant, does not of itself prove any omission of care on the part of the master in his employment and it is only when there is such omission of care that the master can be said to be guilty of personal wrong in placing or continuing such servant in his employ, or has done or omitted aught justifying the placing upon him the responsibility for such employe's negligence.

Again, a master employing a servant impliedly engages with him that the place in which he is to work and the tools or machinery with which he is to work, or by which he is to be surrounded, shall be reasonably safe. It is the master who is to provide the place and the tools and the machinery, and when he employs one to enter into his service he impliedly says to him that there is no other danger in the place, the tools, and the machinery, than such as is obvious and necessary. Of course, some places of work and some kinds of machinery are more dangerous than others, but that is something that inheres in the thing itself, which is a matter of necessity, and cannot be obviated. But within such limits the master who provides the place, the tools, and the machinery owes a positive duty to his employe in respect thereto. That positive duty does not go to the extent of a guaranty of safety, but it does require that reasonable precau-

tions be taken to secure safety, and it matters not to the employe by whom that safety is secured, or the reasonable precautions therefor taken. He has a right to look to the master for the discharge of that duty, and if the master, instead of discharging it himself, sees fit to have it attended to by others, that does not change the measure of obligation to the employe, or the latter's right to insist that reasonable precaution shall be taken to secure safety in these respects. Therefore it will be seen that the question turns rather on the character of the act than on the relations of the employes to each other. If the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master; but if it be not one in the discharge of such positive duty, then there should be some personal wrong on the part of the employer before he is held liable therefor. But, it may be asked, is not the duty of seeing that competent and fit persons are in charge of any particular work as positive as that of providing safe places and machinery? Undoubtedly it is, and requires the same vigilance in its discharge. But the latter duty is discharged when reasonable care has been taken in providing such safe place and machinery, and so the former is as fully discharged when reasonable precautions have been taken to place fit and competent persons in charge. Neither duty carries with it an absolute guaranty. Each is satisfied with reasonable effort and precaution.

In the case of *Railroad Co. v. Moore*, 29 Kan. 632, 644, Mr. Justice Valentine, speaking for the court, thus succinctly summed up the law in these respects; "A master assumes the duty towards his servant of exercising reasonable care and diligence to provide the servant with a reasonably safe place at which to work, with reasonably safe machinery, tools, and implements to work with, with reasonably safe materials to work upon, and with suitable and competent fellow servants to work with him; and when the master has properly discharged these duties, then, at common law, the servant assumes all the risks and hazards incident to or attendant upon the exercise of the particular employment or the performance of the particular work, including those risks and hazards resulting from the possible negligence and carelessness of his fellow servants and co-employes. And at common law, whenever the master delegates to any officer, servant, agent, or employe,

high or low, the performance of any of the duties above mentioned, which really devolve upon the master himself, then such officer, servant, agent, or employe stands in the place of the master, and becomes a substitute for the master, a vice principal, and the master is liable for his acts or his negligence to the same extent as though the master himself had performed the acts or was guilty of the negligence. But at common law, where the master himself has performed his duty, the master is not liable to any one of his servants for the acts or negligence of any mere fellow servant or co-employe of such servant, where the fellow servant or co-employe does not sustain this representative relation to the master."

It would be easy to accumulate authorities on these propositions, for questions of this kind are constantly arising in the courts. It is enough, however, to refer to those in this court. In the cases of *Hough v. Railway Co.*, 100 U. S. 213; and *Railroad Co. v. Herbert*, 116 U. S. 642; 6 Sup. Ct. Rep. 590, this court recognized the master's obligation to provide reasonably suitable place and machinery, and that a failure to discharge this duty exposed him to liability for injury caused thereby to the servant, and that it was immaterial how or by whom the master discharged that duty. The liability was not made to depend in any manner upon the grade of service of a co-employe, but upon the character of the act itself, and a breach of the positive obligation of the master. In both of them the general doctrine of the master's exemption from liability for injury to one servant through the negligence of a co-employe was recognized, and it was affirmed that the servant assumed all the risks ordinarily incident to his employment. In *Railroad Co. v. Fort*, 17 Wall. 553, where a boy was injured through dangerous machinery in doing an act which was not within the scope of his duty and employment, though done at the command of his immediate superior, this court while sustaining the liability of the master, did so on the ground that the risk was not within the contract of service, and that the servant had no reason to believe that he would have to encounter such a danger, and declared that the general rule was that the employe takes upon himself the risks incident to the undertaking, among which were to be counted the negligence of fellow servants in the same employment. In the cases of *Randall*

v. Railroad Co., 109 U. S. 478 ; 3 Sup. Ct. Rep. 322, and Steamship Co. v. Merchant, 133 U. S. 375 ; 10 Sup. Ct. Rep. 397, the persons whose negligence caused the injury were adjudged to be fellow servants with the parties injured, so as to exempt the master from liability ; and while the question in this case was not here presented, yet in neither case were the two servants doing the same work, although it is also true that in each of them there was no control by one over the other. It may safely be said that this court has never recognized the proposition that the mere control of one servant over another in doing a particular work destroys the relation of fellow servants, and puts an end to the master's liability. On the contrary, all the cases proceed on the ground of some breach of positive duty resting upon the master, or upon the idea of superintendence or control of a department. It has ever been affirmed that the employe assumes the ordinary risks incident to the service; and, as we have seen, it is obvious that there is risk from the negligence of one in immediate control as from one simply a co-worker. That the running of an engine by itself is not a separate branch of service seems perfectly clear. The fact is, all the locomotives of a railroad company are in the one department ; and those employed in running them, whether as engineers or firemen, are engaged in a common employment and are fellow servants. It might as well be said that, where a liveryman has a dozen carriages, the driver of each has charge of a separate branch of service, and that, if one drives his carriage negligently against another employe, the master is exempt from liability.

It may further be noticed that in this particular case the injury was not in consequence of the fireman's obeying any orders of his superior officer. It did not result from the mere matter of control. It was through negligence on the part of the engineer in running his engine, and the injury would have been the same if the fireman had had nothing to do on the locomotive, and had not been under the engineer's control. In other words, an employe carelessly manages an engine, and another employe who happens to be near enough is injured by such carelessness. It would seem, therefore, to be the ordinary case of the injury of one employe through the negligence of another.

Again, this was not simply one of the risks assumed by the

employee when entering into the employment, and yet not at the moment fully perceived and understood. On the contrary, the peril was known and voluntarily assumed. The plaintiff admits in his testimony that he knew they had no right to the track without orders, and that there was a local train on the road somewhere between them and Bellaire; and yet, with this knowledge, and without protest, he voluntarily rode on the engine with the engineer. *Hammond v. Railway Co.*, 83 Mich. 334; 47 N. W. Rep. 965; *Railway Co. v. Leech* 41 Ohio St. 388; *Wescott v. Railroad Co.*, 153 Mass. 460; 27 N. E. Rep. 10.

In the first of these cases the party injured was a section hand, who was injured while riding on a hand car, in company with a fellow laborer and the section foreman, and the negligence claimed was in propelling the hand car along a curved portion of the track, with knowledge of an approaching train, and without sending a lookout ahead to give warning. In respect to this, Mr. Justice Cahill, speaking for the court, says: "But, if this conduct was negligent, it was participated in by Hammond. The latter had been going up and down this section of the road daily for three months. Whatever hazard there was in such a position was known to him, and he must be held to have voluntarily assumed it. * * * Where, as in this case, the sole act of negligence relied on is participated in, and voluntarily consented to, by the person injured, with full knowledge of the peril, the question of the master's liability does not arise."

So, in this case, Baugh equally with the engineer knew the peril, and with this knowledge voluntarily rode with the engineer on the engine. He assumed the risk.

For these reasons we think the judgment of the circuit court was erroneous, and must be reversed, and the case remanded for a new trial.

Mr. Chief Justice FULLER (dissenting).—I dissent, because in my judgment, this case comes within the rule laid down in *Railway Co. v. Ross*, 112 U. S. 37; 5 Sup. Ct. Rep. 184, and the decision unreasonably enlarges the exemption of the master from liability for injury to one of his servants by the fault of another.

Mr. Justice FIELD (dissenting).—I am unable to concur in the judgment of reversal in this case. I think the judgment of the

circuit court is correct in principle, and in accordance with the settled law of Ohio, where the cause of action arose, which, in my opinion, should control the decision.

The plaintiff below, the defendant in error here, is a citizen of the state of Ohio, and the defendant, the Baltimore & Ohio Railroad Company is a corporation created under the laws of Maryland. The present action was brought by the plaintiff in the court of common pleas of the county of Belmont, in the state of Ohio. The defendant claimed citizenship in Maryland, by virtue of its incorporation in that state, and it petitioned for and obtained a removal of the action to the circuit court of the United States for the southern district of Ohio. The plaintiff was a fireman on a locomotive of the defendant, which, on the 4th of May, 1885, had been employed in assisting a freight train from Bellaire, in Ohio, to the top of the grade, about twenty miles west of that place, when it was detached from the freight train to return to Bellaire. It would seem that by the regulations or usages of the company it was to return in conformity with orders from the train dispatcher, or upon information from him as to the use or freedom of the road, or, in the absence of such orders or information, by following close behind some regular scheduled train which would carry signals to notify trains coming in the opposite direction that the locomotive was following it. It does not appear what special orders or what information, if any, was on this occasion received by the engineer from the train dispatcher, and by his order the locomotive started back without following any scheduled train. He appears to have relied upon his ability to avoid the train possibly coming in the opposite direction by going upon a side track, and waiting until it passed. The result was that the locomotive on its way collided with the regular local passenger train, which was running on its schedule time, and had the right of the road. In the collision the plaintiff below was injured to such an extent that his right arm had to be amputated near the shoulder, and he was rendered unable to use his right leg in walking. To recover damages for the injuries sustained he brought the present action against the railroad company, and the question presented is whether the company was liable for the injuries. He obtained a verdict for \$6,750, for which, and costs, judgment was entered in his favor.

The locomotive, with the tender attached to it, was called a

"helper," because it was used in helping trains up the grade from Bellaire. After it was detached from the train helped, it passed under the direction of the engineer, who was from that time its conductor by appointment under the regular rules of the company. The ninth rule provides that "trains are run under the charge of the conductors thereof, and their directions relative to the management of trains will be observed, except in cases where such directions may be in violation of the rules of this company or of safety, in which cases engineers will call the attention of the conductors to the facts as understood by them, and decline compliance; conductors and engine men being in such cases held equally responsible." And the tenth rule provides that, "whenever a train or engine is run without a conductor, the engine man [that is, the engineer] thereof will also be regarded as conductor, and will act accordingly." The engineer was thus invested from that time with the powers and duties of a conductor. He could then control the movements of the locomotive, and, in the absence of special orders, direct when it should start on its return to Bellaire, the places at which it should stop, and the speed with which it should proceed. The position that the company could not alter its relations to the engineer and those under his direction by such appointment does not rest upon any tenable ground. There certainly is no substantial reason why the company may not at any time constitute one of its employes a conductor of an engine or train. It is a matter resting in its discretion to appoint a conductor or to remove him from that position at any time. The duties and liabilities of the officer and his relations to the company depend upon the nature of the office which he at the time holds, not upon his duties and relations in a previously existing employment. If the corporation, acting by its directors, either by special designation or by established rule, appoint a person as conductor, generally or for a limited time, he takes the duties and incurs the responsibilities of the appointment from that date. The person previously a subordinate or co-employee becomes thereby the superior of the fellow laborer in his powers, and changed in his relations to the company. To say that he continues in his previous subordination and relationship to the company would be like stating that a common soldier taken from the ranks and put in command of a company or regiment of

which he was a member still retains his subordinate relations to his former fellow soldiers and to the commander-in-chief. To hold that an engineer in the position placed by the rule of the company did not become a conductor in fact is refusing to give effect to the express terms of the rule. It is declaring that he shall not be what the established rule of the company declares he shall be. I do not think that this position can be maintained.

A conductor of a train or engine, is by the very nature of the office, its manager and director in the particular service in which it is employed within the general regulations of the company. He directs, subject to such general regulations, when the train or engine shall start, at what speed it shall travel, what special route it shall take within the designated limits of the company, and, when necessary, may designate who shall be employed under him. In the case before us he represented the company in all these respects; otherwise the company was without a representative on the helper, which will not be contended. In its management, he, as conductor, stood in the place of the company, and, if any one was injured by his negligence in the discharge of his duties, the company was responsible.

The court below instructed the jury in substance as follows: That the law assumes that where a person enters into any employment he takes the risks incident to that employment so far as they may result from the nature of the employment itself, or from the negligence or default of his fellow servants,—that is, of those who are not placed in authority and control over him,—but who occupy substantially the same relation to the company as he does; but that, if an injury results to an employe from the negligence or carelessness on the part of one placed in authority over the employes of the company so as to direct and control them, the company is liable; that, therefore, if the engineer and the fireman were fellow servants, as thus described, the plaintiff could not recover; but that if the engineer was the agent or representative of the company, and the fireman acted under his direction and was subject to his orders, and the injury resulted from the default or negligence or wrong of the engineer, then it must be attributed to the company as the negligence, default, or wrong of the company.

In thus instructing the jury the court followed the law as set-

tled by the decisions of the supreme court of Ohio,—in which state the cause of action arose and the case was tried,—that the company was liable if the negligence was by one acting in the character of its representative or agent in directing or controlling the movements of the locomotive, and the party injured was subject to his orders. Any other ruling would have been at variance with those decisions. The law of Ohio on the matter under consideration was the law to control. The courts of the United States cannot disregard the decisions of the state courts in matters which are subjects of state regulation. The relations of employes, subordinate to the directors of the company, but supervising and directing the labors of others under them, to their principals and the liability of the principals for the negligent acts of their subordinate supervising and directing agents, are matters of legislative control, and are in no sense under the supervision or direction of the judges or courts of the United States. There is no unwritten general or common law of the United States on the subject. Indeed, there is no unwritten general or common law of the United States on any subject. See 1 Tuck. Bl. Comm. Append. 422, 433. The common law may control the construction of terms and language used in the constitution and statutes of the United States, but creates no separate and independent law for them. The federal government is composed of independent states, "each of which," as said in *Wheaton v. Peters*, 8 Pet. 591, 658, "may have its local usages, customs, and common law. There is no principle which pervades the Union, and has the authority of law, that is not embodied in the constitution or laws of the Union. The common law could be made a part of our federal system only by legislative adoption. When, therefore, a common-law right is asserted, we must look to the state in which the controversy originated." And there are few subjects upon which there is such diversity of opinion and conflict of decision, not merely between the courts and judges of the different states, but between the judges of the federal courts, as the liability of employers for the negligent acts of their subordinate agents, having control and direction of servants in a common employment under them. Even as to what shall be deemed a common employment, Mr. Beach, a leading writer on contributory negligence, states that there are many "hundreds of clearly

irreconcilable decisions." Conceding that a federal court, sitting within a state where the law relating to the subject under consideration is unsettled and doubtful, must exercise an independent judgment and declare the law upon the best light it can obtain, this rule has no application where the law of the state is neither unsettled nor doubtful, but is established and certain, and recognized as such by its judicial authorities. While, as we have indicated, there is no general or common law throughout the country—that is of the United States—as to the extent and limits of the liability of a corporation to its employes in the case of a common employment under a supervising and directing agent, in Ohio the law on the subject is neither uncertain nor doubtful; it has been settled there for many years. In *Railroad Co. v. Stevens*, 20 Ohio, 415, it was held by the supreme court of that state, over forty years ago, that where an employer placed one in his employ under the direction of another, also in his employ, such employer was liable for injury to the person placed in a subordinate situation by the negligence of his superior; and that decision has been adhered to ever since. There a railroad company had placed an engineer in its employ under the control of the conductor of one of its trains, who directed when the cars were to start and when to stop, and it was held liable for an injury received by him caused by the negligence of the conductor. A collision had occurred by reason of the omission of the conductor to inform the engineer of a change of place ordered in the passing of trains. The company claimed the exemption from liability on the ground that the engineer and conductor were fellow servants, and that the engineer had assumed by his contract the risk of the negligence of the conductor, and also that public policy forbade a recovery in such cases; but the court rejected both positions. In *Railway Co. v. Keary*, 3 Ohio St. 201, the same court affirmed the doctrine thus declared, and held that where a brakeman in the employ of a railroad company, on a train under the control of a conductor having exclusive command was injured by the carelessness of the conductor, the company was responsible, holding that the conductor was the representative of the company upon which rested the obligation to manage the train with skill and care. In its opinion the court said no service was common that did not admit a common participation, and no servants were fel-

low servants when one was placed in control over the other. In *Stone Co. v. Kraft*, 31 Ohio St. 287, decided in 1877, that court held that a master was liable for an injury to a servant resulting from the negligence of a superior servant. There the corporation was organized to quarry and manufacture stone, and, while in the employment of the company and engaged in loading stone upon its cars, one of the employes received an injury through the carelessness and negligence of an agent and servant of the company in the selection and use of unsafe and dangerous implements and machinery for the purpose of loading the stone upon the cars for transportation. The unsafe and defective machinery was selected by the foreman of the quarry. It was contended that the foreman and the laborers under him were fellow servants, but the court held that the foreman, occupying substantially the relation of principal, was in no just or proper sense a fellow servant, nor in what might be properly denominated a common service, and said: "The relation existing between them was such as brings the case clearly within the rule established by repeated adjudications of this court and now firmly settled in the jurisprudence of the state,—that where one servant is placed by his employer in a position of subordination to and subject to the orders and control of another, and such inferior servant, without fault, and while in the discharge of his duties, is injured by the negligence of the superior servant, the master is liable for such injury." It will be observed that the court states in this opinion that the rule of liability was then firmly settled in the jurisprudence of the state. If any rule of law can be considered as settled by judicial decisions, that rule is settled as the law of Ohio. The question is not whether that is the best law for Ohio, but whether it is the law of that state. It will be time to consider of its change or improvement when that matter is submitted to us, which is not yet. If the law were expressed in a statute, no federal court would presume to question its efficacy and binding force. The law of the state on many subjects is found only in the decisions of its courts, and when ascertained and relating to a subject within the authority of the state to regulate, it is equally operative as if embodied in a statute, and must be regarded and followed by the federal courts in determining causes of action affected by it arising within the state. *Bucher v. Railroad Co.*, 125 U. S. 555; 8

Sup. Ct. Rep. 974; *Detroit v. Osborne*, 135 U. S. 492, 497; 10 Sup. Ct. Rep. 1012. For those courts to disregard the law of the state as thus expressed upon any theory that there is a general law of the country on the subject at variance with it, in cases where the causes of action have arisen in the state, and which, if tried in the state courts, would be governed by it, would be nothing less than an attempt to control the state in a matter in which the state is not amenable to federal authority by the opinions of individual federal judges at the time as to what the general law ought to be,—a jurisdiction which they never possessed, and which, in my judgment, should never be conceded to them. That doctrine would inevitably lead to a subversion of the just authority of the state in many matters of public concern. It would also be in direct conflict with section 721 of the Revised Statutes, which declares that “the laws of the several states, except where the constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply.” This provision is a re-enactment of section 34 of the original judiciary act. 1 Stat. 92. Under the terms “laws,” as here mentioned, are not included not merely those rules and regulations having the force of law which are expressed in the statutes of the states, but also those which are expressed in the decisions of their judicial tribunals. The latter are far more numerous, and touch much more widely the interests and rights of the citizens of a state in their varied relations to each other and to society in the acquisition, enjoyment, and transmission of property, and the enforcement of rights and redress of wrongs. The term “laws” in the constitution and the statutes of the United States is not limited solely to legislative enactments unless so declared or indicated by the context. When the fourteenth amendment ordains that no state shall deny to any person within its jurisdiction “the equal protection of the laws,” it means equal protection not merely by the statutory enactments of the state, but equal protection by all the rules and regulations which, having the force of law, govern the intercourse of its citizens with each other and their relations to the public, and find expression in the usages and customs of its people and in the decisions of its tribunals. The guaranty of this

great amendment, "as to the equal protection of the laws," would be shorn of half of its efficacy if it were limited in its application only to written laws of the several states, and afforded no protection against an unequal administration of their unwritten laws. It has never been denied, that I am aware of, that decisions of the regular judicial tribunals of a state, especially when concurring for a succession of years, are, at least, evidence of what the law of the state is on the points adjudged. The law, being thus shown, is as obligatory upon those points in another similar case, arising in the state, as if expressed in the most formal statutory enactments. If this is not so, I may ask, in anticipation of what I may say hereafter, what becomes of the judicial independence of the states?

The doctrine that the application of the so-called general and unwritten law of the country to control a state law, as expressed by its courts, in conflict with it, has the sanction of congress by its supposed knowledge of the decisions of this court to that effect, and its subsequent silence respecting them, does not strike me as having any persuasive force. The silence of congress against judicial encroachments upon the authority of the states cannot be held to estop them from asserting the sovereign rights reserved to them by the tenth amendment of the constitution. Such silence can neither augment the powers of the general government nor impair those of the states. Silence by one or both will not change the constitution and convert the national government from one of delegated and limited powers, or dwarf the states into subservient dependencies. Acquiescence in or silence under unauthorized power can never give legality to its exercise under our form of government.

Marshall, when a member of the Virginia convention called to consider the question of the adoption of the constitution of the United States, in answer to an inquiry as to the laws of what state a contract would be determined, answered: "By the laws of the state where the contract was made. According to those laws, and those only, can it be decided." 3 Elliott, Deb. 556.

Judge Tucker, in the appendix to the first volume of his edition of Blackstone, says that the common law has been variously administered or adopted in the several states. Is the federal judicial department to force upon these states views of the com-

mon law which their courts and people have repudiated? I cannot assent to the doctrine that there is an atmosphere of general law floating about all the states, not belonging to any of them, and of which the federal judges are the especial possessors and guardians, to be applied by them to control judicial decisions of the state courts whenever they are in conflict with what those judges consider ought to be the law.

The present case presents some singular facts. The verdict and judgment of the court below were in conformity with the law of Ohio, in which state the cause of action arose and the case was tried, and this court reverses the judgment because rendered in accordance with that law, and holds it to have been error that it was not rendered according to some other law than that of Ohio, which it terms the general law of the country. This court thus assumes the right to disregard what the judicial authorities of that state declare to be its law, and to enforce upon the state some other conclusion as law which it has never accepted as such, but always repudiated. The fireman, who was so dreadfully injured by the collision caused by the negligence of the conductor of the engine that his right arm had to be amputated from the shoulder and his right leg was rendered useless, could obtain some remedy from the company by the law of Ohio as declared by its courts, but this court decides, in effect, that that law, thus declared, shall not be treated as its law, and that the case shall be governed by some other law which denies all remedy to him. Had the case remained in the state court, where the action was commenced, the plaintiff would have had the benefit of the law of Ohio. The defendant asked to have the action removed, and obtained the removal to a federal court because it is a corporation of Maryland, and thereby a citizen of that state by a fiction adopted by this court that members of a corporation are presumed to be citizens of the state where the corporation was created, a presumption which, in many cases, is contrary to the fact, but against which no averment or evidence is held admissible for the purpose of defeating the jurisdiction of a federal court. *Railroad Co. v. Letson*, 2 How. 497; *Cowless v. Mercer Co.*, 7 Wall. 121; *Paul v. Virginia*, 8 Wall. 168, 178; *Steamship Co. v. Tugman*, 106 U. S. 120; 1 Sup. Ct. Rep. 58. Thus in this case a foreign corporation not a citizen of the state of Ohio, where the cause of action

arose, is considered a citizen of another state, by a fiction, and then, by what the court terms the general law of the country, but which the court held in *Wheaton v. Peters* has no existence in fact, is given an immunity from liability in cases not accorded to a citizen of that state under like circumstances. Many will doubt the wisdom of a system which permits such a vast difference in the administration of justice for injuries like those in this case between the courts of the state and the courts of the United States.

I am aware that what has been termed the general law of the country—which is often little less than what the judge advancing the doctrine thinks at the time should be the general law on a particular subject—has been often advanced in judicial opinions of this court to control a conflicting law of a state. I admit that learned judges have fallen into the habit of repeating this doctrine as a convenient mode of brushing aside the law of a state in conflict with their views. And I confess, that moved and governed by the authority of the great names of those judges, I have, myself, in many instances, unhesitatingly and confidently, but I think now erroneously, repeated the same doctrine. But, notwithstanding the great names which may be cited in favor of the doctrine, and notwithstanding the frequency with which the doctrine has been reiterated, there stands, as a perpetual protest against its repetition, the constitution of the United States, which recognizes and preserves the autonomy and independence of the states,—independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the states is in no case permissible except as to matters by the constitution specially authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the state, and, to that extent, a denial of its independence. As said by this court, speaking through Mr. Justice Nelson, “the general government and the states, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the states, within the limits of their powers not granted, or, in the language of the tenth amendment, ‘reserved,’ are as independent of the general

government as that government within its sphere is independent of the states." *Collector v. Day*, 11 Wall. 113, 124.

To this autonomy and independence of the states their legislation must be as free from coercion as if they were separated entirely from connection with the Union. There must also be the like freedom from coercion or supervision in the action of their judicial authorities. Upon all matters of cognizance by the states, over which power is not granted to the general government the judiciary must be as free in its action as the courts of the United States are independent of the state courts in matters subject to federal cognizance. "Such being the separate and independent condition of the states in our complex system, as recognized by the constitution, and the existence of which is so indispensable that, without them, the general government itself would disappear from the family of nations, it would seem to follow," as said by the court in the case cited, "as a reasonable, if not a necessary consequence, that the means and instrumentalities employed for carrying on the operations of their governments, for preserving their existence, and fulfilling the high and responsible duties assigned them in the constitution, should be left free and unimpaired should not be liable to be crippled, much less defeated, by the taxing power of another government," to which we may add, nor by the supervision and action of another government in any form. "We have said," continues the court in the same case, "that one of the reserved powers was that to establish a judicial department; it would have been more accurate, and in accordance with the existing state of things at the time to have said the power to maintain a judicial department. All of the thirteen states were in possession of this power, and had exercised it at the adoption of the constitution; and it is not pretended that any grant of it to the general government is found in that instrument. It is, therefore, one of the sovereign powers vested in the states by their constitutions, which remained unaltered and unimpaired, and in respect to which the state is as independent of the general government as that government is independent of the states."

Such being the nature of the judicial department, and the free exercise of its powers being essential to the independence of the states, how can it be said that its decisions as to the law of the state, upon a matter subject to its cognizance, can be ignored and

set aside by the courts of the United States for the law or supposed law of another state or sovereignty, be it the general or special law of that state or sovereignty? If a federal court exercises its duties within one of the states where the law on the subject under consideration is uncertain and unsettled, "where," as Chief Justice Marshall said, "the state courts afford no light," it must, as we have already stated, exercise an independent judgment thereon, and pronounce such judgment as it deems just. But no foreign law or law out of the state, whether general or special, or any conception of the court as to what the law ought to be, has any place for consideration where the law of the state in which the action is pending is settled and certain. A law of the state of that character, whether expressed in the form of a statute or in the decisions of the judicial department of the government, cannot be disregarded and overruled, and another law, or notion of what the law should be, substituted in its place, without a manifest usurpation by the federal authorities. I cannot permit myself to believe that any such conclusion, when more fully examined, will ultimately be sustained by this court. I have an abiding faith that this, like other errors, will in the end "die among its worshipers."

The independence of the states, legislative and judicial, on all matters within their cognizance is as essential to the existence and harmonious workings of our federal system as is the legislative and judicial supremacy of the federal government in all matters of national concern. Nothing can be more disturbing and irritating to the states than an attempted enforcement upon its people of a supposed unwritten law of the United States, under the designation of the general law of the country, to which they have never assented, and which has no existence except in the brain of the federal judges in their conceptions of what the law of the states should be on the subjects considered.

The theory upon which inferior courts of the United States take jurisdiction within the several states is, when a right is not claimed under the constitution, laws, or treaties of the United States, that they are bound to enforce, as between the parties, the law of the state. It was never supposed that, upon matters arising within the states, any law other than that of the state would be enforced, or that any attempt would be made to enforce

any other law. It was never supposed that the law of the state would be enforced differently by the federal courts sitting in the state, and the state courts; that there could be one law when a suitor went into the state courts and another law when the suitor went into the federal courts, in relation to a cause of action arising within the state,—a result which must necessarily follow if the law of the state can be disregarded upon any view which the federal judge may take of what the law of the state ought to be rather than what it is.

As said by the supreme court of Pennsylvania at an early day,—as far back as 1798,—“the government of the United States forms a part of the government of each state.” *Respublica v. Cobbet*, 3 Dall. 473. To which the same court, over half a century later, added: “It follows that its courts are the courts of each state; they administer justice according to the laws of the state as construed and settled by its own supreme tribunal. This has been more than once solemnly determined by the supreme court of the Union to be the rule of their decision, whenever the construction of the constitution of the United States, treaties or, acts of congress does not come in question.” *Com. v. Pittsburg & C. R. Co.*, 58 Pa. St. 44.

In *Shelby v. Guy*, 11 Wheat. 362, 365, this court, in considering the meaning to be given to the words “beyond the seas,” in a statute of limitations of Tennessee, said: “That the statute laws of the states must furnish the rule of decision to this court so far as they comport with the constitution of the United States in all cases arising within the respective states, is a position that no one doubts. Nor is it questionable that a fixed and received construction of their respective statute laws, in their own courts, makes, in fact, a part of the statute law of the country, however we may doubt the propriety of that construction. It is obvious that this admission may, at times, involve us in seeming inconsistencies, as, where states have adopted the same statutes and their courts differ in the construction. Yet that course is necessarily indicated by the duty imposed on us to administer, as between certain individuals, the laws of the respective states, according to the best lights we possess of what those laws are.”

In *Beauregard v. New Orleans*, 18 How. 497, 502, which was before us in 1855, this court in speaking through Mr. Justice

Campbell, said: "The constitution of this court requires it to follow the laws of the several states as rules of decision wherever they properly apply. And the habit of the court has been to defer to the decisions of their judicial tribunals upon questions arising out of the common law of the state, especially when applied to the title of lands. No other course could be adopted with any regard to propriety. Upon cases like the present the relation of the courts of the United States to a state is the same as that of its own tribunals. They administer the laws of the state, and to fulfill that duty they must find them as they exist in the habits of the people and in the exposition of their constituted authorities. Without this the peculiar organization of the judicial tribunals of the states and the Union would be productive of the greatest mischief and confusion."

The position that the plaintiff, the fireman, voluntarily assumed the risk in this case, because he knew the helper had no right to the track without orders, and there was possibly a local train somewhere on the track, by continuing on the train instead of leaving it, does not strike me as having much force. It was not considered of sufficient importance to be called to the attention of the court below or of the jury. Its suggestion now seems to be an afterthought of counsel. It is not positively shown that any special orders as to the movement of the helper on its return, or any information as to the use or freedom of the road, were received by the engineer from the train dispatcher; but the fireman had no actual knowledge on that point, though he had a right to presume that such was the case, from the fact that immediately upon the receipt of an order given to the conductor, at Burr's Mills, the latter directed that the helper start back. Nor did the fireman have any actual knowledge whether the train he was directed to follow was or was not a regular scheduled train, though he had a right to presume that it was, from the orders of the conductor. His information as to what was known, and consequently directed or omitted, by the engineer on that subject was too imperfect for him to act upon it. His continuance as fireman on the locomotive after its movement to return to Bellaire, was not with sufficient knowledge of any failure of the engineer to give the proper orders as to a scheduled train to justify an abandonment of the locomotive. It was under the direction of the engineer, not

of the fireman, and he may have felt confident that it could be run on a side track, if necessary, to avoid any possible collision with a train coming in the opposite direction, as was sometimes done. It would be a dangerous notion to put into the heads of firemen and other employes of a railroad company that if they had reason to believe, without positive information on the subject, that dangers attended the course pursued by the movements of the train under the direction of its conductor they would be deemed to assume the risk of such movements if they did not expostulate with him, and, if he did not heed the expostulation, leave the train, even after it had commenced one of its regular trips. A strange set of legal questions would arise, more embarrassing to the courts than the fellow-servant question, if such action should be deemed essential to the retention by the employe of the right to claim indemnity for injuries which might follow from the course pursued. If the employes could abandon a train after it had commenced one of its regular trips when they had reason to believe, without absolute information, that danger might attend their continuance on it, new strikes of employes would spring up to embarrass the commerce of the country and annoy the community, founded upon such alleged apprehensions. The circumstances attending the cases in which an employe has been held to have voluntarily assumed the risks of an irregular, improper, or ill-advised movement of a train, under direction of its conductor, are essentially different from those of the case before us. The testimony in the record, upon which the allegation is made that the fireman voluntarily assumed the risks taken by the engineer with knowledge of their existence, is of the most flimsy and unsatisfactory character conceivable. It only discloses general ignorance by him of what the engineer did, or of information upon which he acted, as will be seen by its perusal. The allegation, which is founded upon a few broken and detached sentences, loses its entire force when the context is read. The whole testimony bearing upon this subject is given in a note at the foot of this dissent.*

* The detached and broken sentences, upon which the allegation is made that the plaintiff voluntarily assumed the risk in the case, are printed in italics in the passage from the record in which they are given below with their context:

It only remains to notice the observations made upon the decision in the Ross case, 112 U. S. 377 ; 5 Sup. Ct. Rep. 184, which seem to me to greatly narrow its effect and destroy its usefulness as a protection to employes in the service of large corporations,

As to orders received on the morning the train started back to Bellaire:

Record, p. 40. "Question. Now, Mr. Baugh, do you know of any order that was received that morning by your train? Answer. Yes, sir.

A. "What do you know of? A. All I know is an order thrown off while we were at Burr's Mills, and I gave it to the engineer, and he told me to let him out; that we would go.

"Q. What was that order? A. I don't know.

"Q. Do you know what it was? A. No, sir.

"Q. What happened immediately after you gave your engineer that order? A. He told me to let him out.

"Q. What did happen immediately after you gave that order to the engineer? A. He started to go.

"Q. Who opened the switch? A. I did it.

"Q. What did you do then? A. Shut the switch and got on the engine."

* * * * *

Record, p. 41. "Q. Do you know what time it was when you started out of the switch at Burr's? A. No, sir.

"Q. Did you know then what time of day it was? A. No, sir.

"Q. Did you pay any attention to that at all? A. No; I did not. It was not my business to pay attention.

"Q. Well, I was going to ask you was that any part of your duty? A. No, sir.

"Q. Whose direction were you under? A. Under my engineer's.

"Q. Did you receive any orders as you went west that morning at Lewis' Mills? A. I don't know.

"Q. On your helper, who received the orders? A. The engineer did. He received all the orders."

Record, p. 47. "Q. Now, Mr. Baugh, when you got up to Burr's Mills, to that turntable, just explain to the jury the process by which that engine would get back to Bellaire? A. We had all the trains on the road to contend with, and we had to run inside tracks when coming down to keep out of the way of them.

"Q. When did you first learn the fact that you had to keep out of the way,—out of the way of what trains? A. All the trains that was expected.

"Q. The schedule trains, would it not be? A. I reckon.

"Q. What was the process,—what right had you to go back after you got to Burr's Mills or the turntable? You had no right to the track at all unless you had orders, had you? A. No, sir; didn't have no right without orders.

"Q. And you proposed to get a right to the track by writing an order which you have said you did write? A. I was going to flag on the engine. I did not want to run them on my orders.

"Q. You had been running the length of time, whatever it was; you knew the time of this local train out of Bellaire? A. No, sir.

under the direction and control of supervising agents. That was an action brought by a locomotive engineer in the employ of the Chicago, Milwaukee & St. Paul Railroad Company to recover damages for injuries received in a collision which was caused by the negligence of the conductor of the train. The company claimed exemption from liability on the ground that the conductor and engineer were fellow servants; but the court charged the jury that it was clear that if the company saw fit to place one of its employes under the control and direction of another, then the two were not fellow servants engaged in the same common employment, within the meaning of the rule of law which was the subject of consideration, and that by its general order the company made the engineer, in an important sense, subordinate to the conductor. To this charge exceptions were taken. The correctness of the charge was the

“Q. You were in the habit of meeting it? A. I did not know what time they left.

“Q. You knew where you met them always? A. No, sir; we would not meet them perhaps once in a month. We would not meet them once a month sometimes.

“Q. You knew the time of the local train? A. No, sir.

“Q. You knew there was a local train on the road running out of Bellaire in the morning? A. Yes, sir.

“Q. You knew when you were running,—knew where you met them? A. I did not know anything about it that time.

“Q. Is it not a part of your duty to learn these things? I want to know if you did not know that there was a local train and has been for the last ten years running out of Bellaire about the same time,—about the same hour and the same minute. A. No, indeed; I did not.

“Q. And you were at work at—in the shops and yard, and did not know anything about it? A. No, sir; I did not.

“Q. You entirely overlooked that fact? No answer.”

* * * * *

Record, p. 49. “Q. *Did you know that there was a local train coming out about that time?* A. I knew there was a local train on the road some place.

“Q. Between you and Bellaire? A. Yes, sir.

“Q. I wish you would explain to the jury what you mean by flagging. You say your intention was to flag down to Bellaire. How is that done? A. We make out an order and give it to the engineer on the train we want to follow; sign the engineer's name; and I went with this flag on the train, and our engine followed behind until we met another train, and then we would side track there and pass.

“Q. That is, you would keep far enough ahead so that if you met a train you would signal it and stop the train? A. I would go right on the train that had the right of the way of track, and our engine followed after.”

question discussed in the case by counsel, and determined by the court. Its correctness was necessarily sustained by the judgment of affirmance, which could not have been rendered if the exceptions to it were well taken. The majority of the court in their opinion, while admitting that the charge is much like the one in the present case, and might be well said to be sufficient authority for sustaining and affirming the judgment, contend that the court did not attempt to approve the instruction generally, but simply held that it was not erroneous as applied to the facts of the case, and in support of this view cite the language of the court used to show that the conductor of a railway company, exercising certain authority, represents the company, and, therefore, for injuries resulting from his negligent acts the company was responsible, and the statement that the case required no further decision. Clearly, it did not require any further decision, for it covers the instruction objected to, that if the company saw fit to place one of its employes under the control and direction of another, then the two were not fellow servants engaged in the same employment within the meaning of the rule of law as to fellow servants. A conductor of a railway company, directing the movements of its train, and having its general management, illustrates the general doctrine asserted and sought to be maintained throughout the opinion in the Ross case, that railroad companies in their operations, extending in some instances hundreds and even thousands of miles, and passing through different states must necessarily act through superintending agents,—employes subordinate to the company, but superior to the employes placed under their direction and control. The necessity of this doctrine of subordinate agencies standing for and representing the company was well illustrated in the duties and powers of a conductor of a train or engine. They were stated as an illustration of the necessity and wisdom of the rule, and not to weaken or narrow the general doctrine asserted in the decision of the court, and which its opinion, in almost every line, attempted to maintain. The necessity of subordinate agencies exists whenever a train or engine is removed from the immediate presence and direction of the head officers of the company.

The opinion of the majority not only limits and narrows the doctrine of the Ross case, but, in effect, denies, even with the limitations placed by them upon it, the correctness of its general doc-

trine, and asserts that the risks which an employe of a company assumes from the service which he undertakes is from the negligence of one in immediate control, as well as from a co-worker, and that there is no superintending agency for which a corporation is liable, unless it extends to an entire department of service.

A conclusion is thus reached that the company is not responsible in the present case for injuries received by the fireman from the negligent acts of the conductor of the engine.

There is a marked distinction in the decisions of different courts upon the extent of liability of a corporation for injuries to its servants from persons in their employ. One course of decisions would exempt the corporation from all responsibility for the negligence of its employes, of every grade, whether exercising supervising authority and control over other employes of the company or otherwise. Another course of decisions would hold a corporation responsible for all negligent acts of its agents, subordinate to itself, when exercising authority and supervision over other employes. The latter course of decisions seems to me most in accordance with justice and humanity to the servants of a corporation. I regret that the tendency of the decision of a majority of the court in this case is in favor of the largest exemptions of corporations from liability. The principle in the *Ross* case covers this case, and requires, in my opinion, a judgement of affirmance.*

1. The principal case.—The foregoing case is undoubtedly an important one in respect to the law of fellow servants. It will be found to have been cited, followed, distinguished or commented upon in the following recent cases: *Bloyd v. St. Louis, etc., R. Co.*, *post*; *Dewey v. Detroit, etc., R. Co.* (Mich.), 56 N. W. Rep. 756; *Atchison, etc., R. Co. v. Martin* (N. M.), 34 Pac. Rep. 536; *Illinois Cent. R. Co. v. Spence* (Tenn.), 23 S. W. Rep. 211; *Harley v. Louisville, etc., R. Co.*, 57 Fed. Rep. 144; *Little Rock, etc., R. Co. v. Moseley*, 56 Fed. Rep. 1009.

2. State decisions as to who are fellow servants not binding on the federal courts.—The decision of the foregoing case upon this point has been approved in *Gardner v. Michigan Central R. Co.* (U. S.), 14 Sup. Ct. Rep. 140.

3. Fellow servants.—For decisions relating to this subject generally, see the preceding and following cases and notes.

*Reported in 149 U. S. 368; 13 Sup. Ct. Rep. 913.

BLOYD v. ST. LOUIS & S. F. RY. CO.

(Supreme Court of Arkansas, July 1, 1898.)

1. RAILROAD COMPANIES. INJURY TO EMPLOYEE. FELLOW SERVANTS. NEGLIGENCE OF FOREMAN. The foreman of a crew engaged in driving piles for trestles for a railroad company, whose business extends to many trestles and bridges, and who has charge of all the men in the crew, including the trainmen, while actually co-operating with the other men in building and repairing trestles, is a vice principal, for whose negligence while in charge of such crew the company is liable to a member thereof, who is injured thereby.

ACTION by Jesse Bloyd against the St. Louis & San Francisco Railway Company, for personal injuries caused by defendant's negligence while plaintiff was in its employ. From a judgment for defendant, plaintiff appeals.

J. D. Walker and Crump & Watkins, for appellant. *E. D. Kenna and B. R. Davidson*, for appellee.

MANSFIELD, J.—The appellant brought this action to recover damages for an injury sustained while performing labor for the appellee as one of a squad of men engaged in sharpening and driving piles at a trestle on the appellee's road. The timber used for the piling, together with the machinery employed in the work, was carried to the trestle by a train consisting of an engine, caboose, and several flat cars, and it was one of the duties of the appellant to assist in unloading the cars. He and the other pile drivers worked under the immediate direction and control of M. C. Munden, who was their foreman, and had power to employ and discharge them.

Munden had no power to employ or discharge the train crew, but they were also subject to his orders, while actually in the field, and co-operating with his men in building and repairing trestles.

In a general sense, the work on trestles was done under the supervision of one Bradley, who was the defendant's superintendent of bridges; but it does not appear that Bradley was at any time present when work was going on, or that he ever personally supervised the labor of the gang, or exercised any direct control

over them. Bloyd was employed by Munden, and, so far as the evidence discloses, he and the other men of the squad to which he belonged had no knowledge of any other superior or master in the service. Munden seems to have performed no labor whatever in common with the men he controlled. His business was to oversee and direct their work, and it was their duty to obey his orders. On the day the injury complained of was received, three flat cars loaded with piles were placed in front of the engine, and taken to the trestle. These cars were pushed to the north end of the trestle, where they were detached, and left standing while the engine, with four flat cars behind it, was backed about seventy-five yards, and stopped where a part of it rested on the south end of the trestle. Bloyd and the other men were then ordered by Munden to go from the caboose to the front cars, and unload them, which they did. When they had finished unloading the front cars, Munden ordered them to go back, and unload the cars behind the engine, and about the same time directed the trainmen to move forward one or two car lengths. The witnesses are not agreed as to whether the orders to the men on the front cars to go back, and that to the trainmen to move forward, were given without a pause or not. Bloyd himself testified that he and others started back at once, on receiving the order, and that, before they had gone half-way to the engine, Munden ordered the train to advance. Whatever the fact might have been as to the exact time of the order to the trainmen, the engine moved forward while Bloyd and several others were still on the trestle between the engine and the unloaded cars; and Bloyd,—who was probably not seen by the engineer,—in his effort to escape, was struck by the step of the engine and knocked off the trestle. He fell upon the unloaded piling, seventeen or eighteen feet below the trestle, and one of his feet was broken by the fall. This was the injury sued for, and the complaint alleges that it was caused by the negligence of Munden. The cause was pending here on appeal at the time of the passage of the act defining who are fellow servants and who are not, approved February 28, 1893; and the question to be decided is not, therefore, affected by any provision of that statute.

It is not necessary to detail all the facts bearing upon the question of negligence and contributory negligence presented by the pleadings. Of these, it is sufficient to say that if, as a matter of

law, the negligence of Munden was imputable to the defendant a verdict for the plaintiff could not have been disturbed here for the want of evidence to support it. It therefore becomes our duty to inquire whether the finding of the jury was made under a correct charge as to the relation which Munden and the plaintiff bore to each other, as employes of the railway company. The facts establishing that relation are not in dispute, and the court's charge was to the effect that Munden was the fellow servant of the plaintiff, and that the defendant was not, therefore, liable for his alleged negligence. All the authorities approve the doctrine that a master is exempt from liability to his servant for an injury to the latter resulting from the negligence of a fellow servant, but there is great diversity of opinion as to the precise facts which make one person the co-servant of another, in the sense essential to the exemption. *Railway Co. v. Triplett*, 54 Ark. 289; 15 S. W. Rep. 831, and 16 S. W. Rep. 266. And it seems that the courts have been inclined to determine whether the relation exists, or does not exist, according to the circumstances of each case, as it arises, rather than to formulate any rule of general application. *Beach*, Contrib. Neg. § 333; *Hunn v. Railroad Co.*, 78 Mich. 518; 44 N. W. Rep. 502; *Randall v. Railroad Co.*, 109 U. S. 483; 3 Sup. Ct. Rep. 322; *Railway Co. v. Ross*, 112 U. S. 387, 389; 5 Sup. Ct. Rep. 184; *Hough v. Railway Co.* 100 U. S. 216; *Railroad Co. v. Reynolds*, 6 U. S. App. 75; 1 C. C. A. 636; 50 Fed. Rep. 728; *Dobbin v. Railroad Co.*, 81 N. C. 446; *Anderson v. Bennet*, (Or.), 19 Pac. Rep. 769; *Railway Co. v. Triplett*, 54 Ark. 289; 15 S. W. Rep. 831, and 16 S. W. Rep. 266; *Railroad Co. v. May*, 15 Amer. & Eng. R. Cas. 323; *Darrigan v. Railroad Co.*, 52 Conn. 285; *Kieley v. Mining Co.*, 2 Cent. Law J. 705.

On the facts of this case, the material question is whether Munden was a mere foreman, overseeing a gang of laborers, or was an agent of the company, clothed with its authority in the management and supervision of such part of its business as to make him the company's representative. If he occupied the former position the laborers had assumed the risk of his negligence; but in the latter case he was a vice principal, and if he was guilty of negligence in that capacity the company is liable. *Dobbin v. Railroad Co.*, 81 N. C. 446; *Fones v. Phillips*, 39 Ark. 39. In

some of the adjudged cases the distinction between the relations indicated by the words "foreman" and "vice principal" is apparently made to depend more upon the extent or magnitude, than upon the nature of the work of which the servant has charge. *Taylor v. Railroad Co.*, (Ind. Sup.) 22 N. E. Rep. 876, 878; *Borgman v. Railway Co.*, 41 Fed. Rep. 667; *Hunn v. Railroad Co.*, 78 Mich. 513; 44 N. W. Rep. 502; *Railroad Co. v. Baugh*, 13 Sup. Ct. Rep. 914. Other courts proceeding upon what we think a sounder principle, have attached no importance to the extent of the work, but have considered only whether it was such as required a skillful or careful supervision; and where such supervision was necessary to the safety of the laborers engaged upon the work, they have held it was the master's duty to bestow it, and that if he appointed an agent to perform that duty he was responsible for his negligence. *Darrigan v. Railroad Co.*, 52 Conn. 285; *Railroad Co. v. Keary*, 3 Ohio St. 201; *Railroad Co. v. Lundstrum* (Neb.), 20 N. W. Rep. 198; *Schroeder v. Railway Co.*, (Mo. Sup.) 18 S. W. Rep. 1094; *Railroad Co. v. Peterson*, 4 U. S. App. 574; 2 C. C. A. 157; 51 Fed. Rep. 182. See, also, separate opinion of Judge Shiras in *Brogman v. Railway Co.*, 41 Fed. Rep. 667. In *Railway Co. v. Ross*, 112 U. S. 377; 5 Sup. Ct. Rep. 184, it was held that the conductor of a railroad train, while acting as such, and having "the right to command the movements of the train, and to control the persons employed upon it, represents the company, * * * and does not bear the relation of fellow servant to the engineer and other employes" on the same train. The rule established by that case, as it has been generally understood and applied by the federal courts, is that the relation of fellow servants "should not be deemed to exist between two employes, where the function of one is to exercise supervision and control over some work undertaken by the master, which requires supervision, and over subordinate servants engaged in that work, and where the other is not vested by the master with any such power of direction or management." *Railroad Co. v. Peterson*, 4 U. S. App. 579; 2 C. C. A. 157; 51 Fed. Rep. 182. The court from whose opinion this quotation is made has declared in another case that the rule, as thus understood, "is right in principle, and is supported by the weight of

authority." *Woods v. Lindvall*, 4 U. S. App. 62; 1 C. C. A. 37; 48 Fed. Rep. 62. In approving the doctrine of the same case, a text writer of authority says: "What is the special attribute of the master? Is it the mere fact that he provides materials for the work, or that he selects the servants? Is it not, more than anything else, that in him is vested the right and duty of giving orders, and directing what work shall be done, and how it shall be done? If the master chooses to delegate this authority to some one else, on what possible principle can he be allowed to relieve himself from the responsibility of having proper orders given?" 1 *Shear. & R. Neg.* § 228. By another text writer the Rule of the *Ross* case is styled "the rule of humanity and justice." *Beach, Contrib. Neg.* § 331. "The real test," says Mr. Wood, "by which to determine whether a general manager or foreman is the representative of the master, so as to make his acts the acts * * * of the master, is to ascertain whether, in reference to the matter complained of, his will is at the time supreme; that is, is he authorized, as to the particular work in hand, to direct and control the servants under him as to the method of performing it, and are they bound to yield to his orders the same obedience as they are required to yield to the master himself?" Wood, *Mast. & Serv.* p. 865.

In *Miller v. Railway Co.*, 19 S. W. Rep. 58, the supreme court of Missouri decided that "the conductor of a material train, having control of it and its movements, and a foreman over a gang of men engaged in repairing a railroad track, having power to direct them what to do, and when to do it, are not fellow servants of the men composing such gang." There the plaintiff's husband, who was one of the laborers under the foreman's control, was in the act of passing from one of the cars to another just as they began to move at a signal given to the engineer by the conductor, and the jar threw him between the wheels, where he received injuries resulting in his death. The evidence tended to show that the deceased was absorbed in his work, and that the train was moved without giving him any warning. Judge Black, in delivering the opinion of the court, said: "The defendant seeks to be relieved from liability in this case on the ground that Miller lost his life by the negligence of a fellow servant, thus invoking the rule that the defendant is not liable to one servant for the

negligence of a fellow servant. The case made by the evidence stands on other and different grounds, as we view it. When the master gives to a person power to superintend, control, and direct the men engaged in the performance of work, such person is, as to the men under him, a vice principal; and it can make no difference whether he is called a superintendent, conductor, boss or foreman, * * * The conductor being a vice principal, it became his duty to give due and timely warning of his intention to move the train." And in the same connection it is said to be one of the absolute duties of the master "to use ordinary care to avoid exposing the servant to extraordinary risks." This Missouri case—somewhat like the case at bar as to part of the facts on which the decision turned—is not different in principle from many other cases that might be cited. See *Schroder v. Railway Co.* (Mo. Sup.) 18 S. W. Rep. 1094; *Anderson v. Bennet* (Or.), 19 Pac. Rep. 765; *Taylor v. Railroad Co.* (Ind. Sup.) 22 N. E. Rep. 876; *Hunn v. Railroad Co.*, 78 Mich. 513; 44 N. W. Rep. 502; *Railroad Co. v. May*; 15 Amer. & Eng. R. Cas. 320, 324; *Railway Co. v. Lundstrum* (Neb.), 20 N. W. Rep. 198; *Dobbin v. Railroad Co.*, 81 N. C. 446; *Cowles v. Railroad Co.*, 84 N. C. 309.

In *Railroad Co. v. Baugh*, 13 Sup. Ct. Rep. 914, it is said that the ruling in *Ross'* case was made upon the ground that the conductor whose negligence caused the injury was "clothed with the control and management of a distinct department," although his management extended to only one train. In the case just cited the supreme court held that the engineer of a locomotive which was running detached from any train could not be regarded as in control of a department of the railroad company's business, so as to make him a vice principal, although he was in charge of the engine, and the rules of the company declared that under such circumstances an engineer should be regarded as a conductor. The Chief Justice and Judge Field dissented. The court distinguishes the case from *Ross'* case on the ground that the running of an engine, by itself, could not constitute a separate branch of service, and on the further ground that the plaintiff—the fireman of the locomotive—was not injured by reason of his obedience to any order of the engineer. *Baugh's* case being thus distinguishable from the *Ross* case, the former is not an authority against treating the defendant's foreman, *Munden*, as a vice principal, for *Munden*

had charge of such work as might well be called a separate branch of the defendant's business, within the rule of the Ross case as that rule was explained by Judge Brewer, and applied by the court, in Borgman v. Railway Co., 41 Fed. Rep. 667; and here there is also evidence tending to show that the injury to the plaintiff was received in obeying the foreman's order. It is held, however, in the Baugh case, that the question as to a master's liability to his servant for the negligence of another servant does not turn merely on the matter of subordination and control, but depends, rather, on whether the act of alleged negligence is done in discharge of some positive duty of the master to his servant. Railroad Co. v. Baugh, 13 Sup. Ct. Rep. 914. We have seen that the supreme court of Missouri regards it as one of the master's positive duties to exercise ordinary care in avoiding the exposure of his servant to extraordinary risks. Miller v. Railway Co. (Mo. Sup.) 19 S. W. Rep. 58. And that duty, it is plain, can only be performed, in many instances, through a proper supervision of the work on which the servant is engaged. That Judge Cooley considers such supervision an absolute duty is shown by the following extract from the opinion of the court, delivered by him in Mining Co. v. Kitts, 42 Mich. 34; 3 N. W. Rep. 240: "This duty of due care in the employment and retention of competent servants is one the master cannot relieve himself of by any delegation; and, if it becomes necessary to intrust its performance to a general manager, foreman, or superintendent, such officer whatever he may be called, must stand in the place of his principal, and the latter must assume the risk of his negligence. The same is true of the general supervision of his business. If there is negligence in this the master is responsible for it, whether the supervision be by the master, in person, or by some manager, superintendent, or foreman to whom he delegates it. In other words while the servant assumes the risk of the negligence of fellow servants, he does not assume the risk of negligence in the master himself, or in any one to whom the master may see fit to intrust his superintending authority." The rule thus stated is quoted and approved in Hunn v. Railroad Co., 78 Mich. 513; 44 N. W. Rep. 502, where it was held that "a train dispatcher, who has absolute control over a division of a railroad, so far as the running and operating of trains are concerned, is not a fellow servant with other employes acting

under his orders." In thus ruling the court said : " It is the duty of the master to supervise, direct and control the operations and management of his business, so that no injury shall ensue to his own employes though his own carelessness or negligence in carrying it on, or else to furnish some person who will do so, and for whom he must stand sponsor. This is true of natural persons, and it is especially true of corporations, who can only act through natural persons." On the same subject the supreme court of Indiana, with reference to the liability of a railroad company for the negligence of a master mechanic, uses the following language : " It is also the master's duty to do no negligent act that will augment the dangers of the service. In this instance, Torrence was doing what the master usually and properly does when present in person, for he was commanding and directing the execution of what he had commanded. By his own act he made it unsafe to do what he had commanded should be done. Acts of the master were therefore done by one having authority to perform them, and the breach of duty was that of one who stood in the master's place." *Taylor v. Railroad Co.* (Ind. Sup.), 22 N. E. Rep. 876. The negligence for which the master is made liable by these decisions is that which Mr. Thompson describes as the " direct negligence of the master, or his vice principal," where he " personally interferes, and either does, or commands the doing of, the act which causes the injury ; and for this, he says, " the master is answerable for damages, to the same extent as though the relation of master and servant did not exist." *Thomp. Neg.* 971, 972. An application of the rule thus stated is shown by the decision of this court in *Telephone Co. v. Woughter*, 56 Ark. 206 ; 19 S. W. Rep. 575. In that case the manager of the defendant, while personally supervising the removal of a telephone pole, which appeared to be sound, though the inside was decayed, ordered a servant to climb the pole and detach the wires. The servant undertook to obey the order, and in doing so was thrown to the ground, and injured, by the breaking of the pole. It was held that, in the absence of contributory negligence on the servant's part, the defendant company was responsible for the damages he sustained, if it failed to use the means a prudent man would have employed to protect the servant from harm. " Among the duties of the servant," said the court, " is the obligation to obey all

reasonable commands of the master. In obeying the commands of the master, if he has no information or knowledge to the contrary, he has a right to presume that the master has done and will do his duty towards him, and can rely upon the judgment and discretion of the master in its performance." It was further said that in that case the company "was constructively present, by and through its manager, and must be held accordingly." Now, it was not the rank or title of manager which made the company present in his person, but the authority with which he was clothed, and the duty of supervision he undertook to perform; and if any officer or agent of inferior grade had been, for the time, invested with the same power, and had undertaken to perform the same duty, the company would, we think, have been equally liable for his negligence. See *Railway Co. v. Triplett*, 54 Ark. 302; 15 S. W. Rep. 831, and 16 S. W. Rep. 266; *Hough v. Railway Co.*, 100 U. S. 213; *Railroad Co. v. May*, 15 Amer. & Eng. R. Cas. 324; Whart. Neg. § 235.

The business of which Munden had charge extended, it seems, to many trestles and bridges, and was clearly such as required supervision. In conducting it, he exercised the powers of a master, and was charged with the performance of a master's duty to the men under his control. And if the plaintiff was injured, through his negligence, in attempting to obey one of his orders, it does not answer the demands of justice to say that they were fellow servants. *Taylor v. Railroad Co.* (Ind. Sup.), 22 N. E. Rep. 876. According to this view, the charge of the court as to the relation existing between Munden and the parties to the suit was an error for which the judgment must be reversed. In remanding the cause for a new trial, it is necessary to observe that the fifth instruction given at the defendant's request defines the care which it was the duty of the plaintiff to exercise for his own safety in language that may be construed to require a higher degree of diligence than the law exacts. On this point, however, it is sufficient to refer to *Railway v. Rice*, 51 Ark. 476; 11 S. W. Rep. 699, and to the authorities there cited.

Reversed.

The Chief Justice did not participate in the decision of this cause.*

* Reported in 22 S. W. Rep. 1089.

RAILROAD COMPANIES. ACCIDENTS TO EMPLOYEES. WHO ARE FELLOW SERVANTS. RECENT DECISIONS.

1. Foreman and laborer under him.—In the following cases the foreman of a gang of men and the members of the gang are held not to be fellow servants, but the foreman is regarded as a vice principal whose negligence is imputable to the principal. *Nall v. Louisville, etc., R. Co.*, 129 Ind. 260; 28 N. E. Rep. 183, 611; *Davis v. New York, etc., R. Co. (Mass.)*, 34 N. E. Rep. 1070; *Palmer v. Michigan Central R. Co.*, 93 Mich. 363; 53 N. W. Rep. 397; *Miller v. Missouri Pac. R. Co.*, 108 Mo. 350; 19 S. W. Rep. 58; *Sweeney v. Gulf, etc., R. Co.*, 84 Tex. 433; 19 S. W. Rep. 555; *Stackman v. Chicago & N. W. Ry. Co.*, 80 Wis. 428; 50 N. W. Rep. 404; *Northern Pac. R. Co. v. Peterson*, 2 C. C. A. 157; 51 Fed. Rep. 182; *Cleveland, etc., R. Co. v. Brown (Ct. of App.)*, 56 Fed. Rep. 804. The contrary is held in *Spancake v. Philadelphia, etc., R. Co.*, 148 Penn. St., 184; 23 Atl. Rep. 1006; *Atchison, etc., R. Co. v. Martin (N. M.)*, 34 Pac. Rep. 536.

A laborer, acting as temporary foreman of a bridge gang, but at the same time actually assisting in the labor, is a fellow servant of the other members of the gang, and one of them who is injured by his negligence cannot recover against the common master. *Texas & Pac. R. Co. v. Rogers (Ct. of App.)*, 57 Fed. Rep. 378.

In an action by a railroad laborer for injuries sustained by the negligence of a temporary foreman who was left in charge during the absence of the regular foreman, where the evidence is conflicting as to the powers of the temporary foreman, the court should clearly and specifically charge that, to justify a finding for plaintiff, the evidence must show that the temporary foreman had full control of the work, with power to employ and discharge the men. *St. Louis, etc., R. Co. v. Lemon*, 83 Tex. 143; 18 S. W. Rep. 331. See, also, *Palmer v. Michigan Cent. R. Co.*, 87 Mich. 281; 49 N. W. Rep. 613.

2. Conductor of train and members of train crew.—The conductor of a freight train, whom, by the rules of the company, the engineer is bound to obey, and who is accountable for the conduct of the trainmen, is a vice principal, and not a fellow servant of a brakeman who is injured in a collision, caused by the negligence of the conductor in violating the time card of the company. *Illinois Central R. Co. v. Spence (Tenn.)*, 23 S. W. Rep. 211. To the same effect are *Northern Pac. R. Co. v. Cavanaugh*, 2 C. C. A. 358; 51 Fed. Rep. 517; *Norfolk & W. R. Co. v. Thomas (Va.)*, 17 S. E. Rep. 884. In the case of *Illinois Central R. Co. v. Spence*, above referred to, the Supreme Court of Tennessee says: "The general rule is well settled that when the particular duties to be discharged require the services of several persons, as in the movement of railway trains, the safety of the employe depends not only upon his own individual skill and prudence, but likewise upon the caution and competency of other persons associated with him in the business; and the employe assumes the risk of danger, not only from his own negligence but likewise from the negligence of his fellow servant. But this general rule exempting the employer from liability to one servant for injury sustained in consequence of the negligence of his fellow servant does not apply when it appears from the facts in the case that an

employee in a subordinate position has been injured by the negligence or improper conduct of another servant placed by the master in a superior position over the former; and when such inferior servant is made subject to the order of such superior, and when the injury occurs during the performance of their duty, a servant who is in a position of authority over the subordinate servant is not in the sense of the law of fellow servant in a common employment, but represents the master, who is liable for his negligence. The reason for this rule stated by Judge McFarland in *Railroad Co. v. Wheelless*, 10 Lea, 746, is based not upon the idea of the relative rank of the two servants, or the general superiority of the one in position, intelligence, or skill, or in the wages received, but upon the ground that the one is placed under the orders and direction of the other, and required to submit to and obey such orders in the performance of his duties; that the inferior is placed in the position of a servant to the superior. In such cases the superior is held to represent the master. In the case of *Railroad Co. v. Lahr*, 86 Tenn. 340, 6 S. W. Rep. 663, Judge Lurton said, viz.: 'Where the inferior is injured while executing a lawful command of his superior, or where the superior represents and stands for the master, and has a right to control the movements of the train and of all the employes, in all such cases the rule of respondeat superior applies with reference to any injury resulting from the official negligence of such superior. *Railroad Co. v. Bowler*, 9 Heisk, 866; *Railroad Co. v. Collins*, 85 Tenn. 227, 1 S. W. Rep. 883.' Says Judge Cooper in *Railroad Co. v. Handman*, 13 Lea, 423: 'In order to charge the master the superior servant must so far stand in the place of the master as to be charged in the particular matter with the performance of the duty towards the inferior servant which under the law the master owes to such servant.' To the same effect is the statement of the rule by Judge McFarland, who says: 'The plaintiff must show that his injury resulted from the carelessness or want of skill of some one who, in the particular matter stands in the place of the master.' *Railroad Co. v. Wheelless*, 10 Lea, 748. Judge Lurton in *Mining Co. v. Davis*, 90 Tenn. 718, 18 S. W. Rep. 387, says: 'Where there is proof tending to show negligence of a superior servant, whereby an inferior servant has been injured, the jury should be instructed that the mere superiority of grade or rank will not determine the liability of the common employer, but that they must look and see whether the negligence was in regard to some duty to the inferior imposed by law upon the master, and by the master intrusted to the negligent superior servant. If this be so, then the rule of respondeat superior applies, for such a superior stands in the shoes of the master, and is a vice principal.'

"The cardinal inquiry, then, that arises on this record is whether the defendant company owed any duty to the plaintiff's intestate, the performance whereof was intrusted to the conductor, and whether the injuries were sustained in consequence of a violation of that duty. It will be conceded that it is the duty of a railroad company to regulate the movements of its trains so that those moving in opposite directions will not come in collision, as stated by the court in *Railroad Co. v. Keary*, 3 Ohio St. 210. From the very nature of the contract of service between the company and its employes the company is under the obligation to them to superintend and control with care and skill the dangerous force employed upon which their safety so essentially depends.

For this purpose, said the court, the conductor is employed, and in this he directly represents the company. They contract for and engage his care and skill. They commission him to exercise that dominion over the operation of the train which essentially pertains to the prerogative of the owner, and in its exercise he stands in the place of the owner in the discharge of a duty which the owner as a man and as a party to the contract of service owes to those placed under him, and whose lives may depend upon his fidelity. It necessarily follows that a conductor placed in charge of a freight train, with authority to direct and control its movements, is a representative of the company, charged with the performance of a duty which the company owes to the public and its employes on the train."

A contrary view is to some extent maintained in *Congrave v. Southern Pac. R. Co.*, 88 Cal. 360; 26 Pac. Rep. 175, but the case really turns upon a construction of the California code relating to master and servant.

A railroad yard, in which trains were made up and switching done, was under the control of a yard master. The several yard switching crews were each under the control of a foreman or conductor. A brakeman of one of the crews claimed to have been injured by the negligence of his foreman in giving a signal at improper time, whereby the train was moved, and ran over his foot. Held, under authority of *Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. Rep. 914, that the foreman and switchman were fellow servants, and the railroad company was not liable for negligence of foreman resulting in injury to switchman. *Harley v. Louisville & N. R. Co.*, 57 Fed. Rep. 144.

3. Conductor or member of train crew and those employed on or about the track.—A quarry hand was working about a railway track, near a curve at which locomotives were required, by defendant's rules, to whistle, under direction of a foreman having no connection with the train service. His duties compelled him to frequently stand on the track with his back towards the curve, and to attend to the movement of small cars carrying rock across the main track to an inclined plane leading to a rock crusher. He was hit and killed by an engine attached to a passenger train, coming rapidly around the curve without the required signal; held, that the deceased was not a fellow servant with the employes operating the train. *Dixon v. Chicago & A. R. Co.*, 109 Mo. 413; 19 S. W. Rep. 412. The opinion of Barclay, J., which was rendered in the divisional court and approved by the court, *in banc*, contains an elaborate discussion of the questions involved with a reference to numerous authorities. He says:

"To-day some enterprises reach across a continent. Often they extend beyond the limits of a single state. Many contemplate the performance of several kinds of business, requiring the employment of thousands, and the organization of several departments of service, separate in their operations, but tending to the general advantage of the common employer. To what extent employes in different lines or departments of business followed or established by such a master, are co-servants is a question constantly recurring, and one of its phases is presented by this case. The circuit court held that the deceased and the trainmen were fellow-servants. In reviewing that ruling we will not essay to establish any definition of fellow service to enlighten (or increase) the difficulties of this branch of the law, but shall merely

deal with the facts before us as shortly as possible. We think it clear that where a common employer carries on two enterprises, as variant in character as those here considered, each under separate superintendence, the employes at work in each cannot justly be regarded as fellow-servants of the employes in the other, within the meaning of the rule of exemption. In the case in hand the master had seen fit to place the deceased quarryman and the trainmen under supervision and management totally apart from each other. They were not 'acting under the same immediate direction.' *Railway Co. v. Mackey* (1887) 127 U. S. 208; 8 Sup. Ct. Rep. 1161. Each looked to a different individual as the master's representative for directions in his work, and had no practical connection with the superior who guided and supervised the acts and conduct of the other. If Dixon, instead of being killed, had merely noticed repeated acts of negligence by the trainmen in omitting to signal its approach, what could he have done to correct such course of conduct, and insure his own safety? Complain to his foreman? The foreman directing his work had no power to discharge or to control the trainmen referred to. The theory that a servant entering employment may fairly be considered to assume the risks (among others) of possible injury from the negligence of his fellow-workmen (now most frequently mentioned as the groundwork of the exemption) can have no just or logical application where the supposed fellow-servants are so widely severed by the division of the employer's business that neither can have a ready appeal to any common superior, having power to require (and, if need be, to enforce) correct and careful conduct on the part of the other. Such an appeal furnishes to the servant the means to avert, or at least to diminish, the dangers arising from incompetency or carelessness on the part of his fellows. But when that appeal is impossible, by reason of the total severance of their fields of labor and of the control to which they severally are subject, we apprehend there is little left of recognizable principle upon which servants so situated can be supposed to have mutually assumed the risks of each other's negligence. Workmen so distantly related to each other in the master's service as the quarryman and the train operators here are scarcely more nearly allied, for all practical purposes of mutual observation, vigilance and protection, than are the servants of different independent contractors, engaged in separate branches of labor upon a common enterprise (though we do not mean to imply that the legal relations between them are identical). Employes of the latter class are universally held not fellow-servants within the rule under discussion. *Abraham v. Reynolds* (1860), 5 Hurl. & N. 142; *Turner v. Railway Co.* (1875), 33 L. T. (N. S.) 431; *Johnson v. Lindsay* (1891), 16 App. Cas. 371; *Svenson v. Steamship Co.* (1874), 57 N. Y. 108; *Railroad Co. v. Conroy* (1886), 63 Miss. 562. Quarrying and operating passenger trains upon a railway are essentially different sorts of work. The risks incident to each are unlike those encountered in the other. Nor were the operatives in these departments thrown into any sort of habitual business association under a common superior. Each line of service appears to have been conducted as independently, in every respect, as though controlled by a stranger to the other, with this exception, the servants in each employment drew compensation from the same source. But we do not regard that fact (standing alone) as furnishing the touchstone of fellow service."

In *Miller v. Missouri Pac. R. Co.*, 108 Mo. 850; 19 S. W. Rep. 58, it was held that a conductor of a material train, having control of it and its movements, and a foreman over a gang of men engaged in repairing a railroad track, having power to direct them what to do and when to do it, are not fellow-servants of the men composing such gang. *Union Pac. R. Co. v. Callaghan*, (Ct. of App.) 56 Fed. Rep. 988, is a similar case and decided the same way. See, also, *Smith v. St. Paul, etc., R. Co.*, 44 Minn., 17; 46 N. W. Rep. 149.

In *Atchison, etc., R. Co. v. Martin*, (N. M.) 34 Pac. Rep. 536, it was held that a section hand on a hand car going to his place of work to aid in repairing the railway, and the conductor and engineer of a working train also engaged in repairing the railway, are fellow servants, and the company is not liable for injuries to the section man caused by the negligence of the conductor and engineer whereby a collision was produced between the train and the hand car.

4. Conductor of one train and employe of another train.—In an action against a railroad company for the death of plaintiff's intestate, a freight conductor in defendant's employ, it appeared that he was in charge of a freight train; that he stopped his train at I., on the main track, as directed by the train dispatcher; that the dispatcher directed a freight train following intestate's train to "run extra" from C. to W., stations on either side of I.; that the following freight train ran into intestate's train at I., thereby causing intestate's death; that, owing to the down grade in approaching S., the ice on the track, and the speed at which the following train was running, such train could not be brought under control in time to prevent the collision. Rule 97 of defendant, which is furnished to all freight conductors and engineers, provides that "freight trains will approach all stations under full control, expecting to find trains using main tracks within station limits." *Held*, that a verdict should be directed for defendant, the engineer of the extra being a fellow servant of intestate, and the accident being caused by his negligence. *Enright v. Toledo, etc., R. Co.*, 93 Mich. 409; 53 N. W. Rep. 536. An assistant fireman of one train is a fellow servant of the conductor of another train, both being in the employ of the same company. *Jenkins v. Richmond & D. R. Co.*, (S. C.) 18 S. E. Rep. 182. To the same effect are *Becker v. Baltimore & O. R. Co.*, 57 Fed. Rep. 188; *Bonner v. Whitcomb*, 80 Tex. 178; 15 S. W. Rep. 899. *Jenkins v. Richmond & D. R. Co.*, is a carefully considered case. The court says: "The employes of a railroad are generally numerous, and necessarily divided into classes, according to the work assigned them. But all of the persons thus employed under one principal in the conduct of one common enterprise, such as operating a railroad, are, according to the ordinary meaning of the word, servants or employes of one principal, and, as it would seem, 'fellow servants' of each other. But it is said that by successive decisions of the courts the rule has been modified, and, according to the limitations imposed, the parties here were not technically 'fellow servants.' After some conflict, we suppose it may be regarded as settled that whether parties are 'fellow servants' in the sense of the rule does not depend upon the grade, rank, or authority of the two servants. A fireman and engineer or conductor are 'fellow servants.' Judge Cooley states that persons are 'fellow servants when they engage in the same common pursuit under the same general control.' Cooley, Torts, 541. Judge Thompson, in his work

on Negligence, announces as a general rule that all who serve the same master work under the same control, derive authority and compensation from the same common source, are engaged in the same general business, though it may be in different grades or departments of it, are fellow servants, who take the risk of each other's negligence. Or, in the forcible view of Judge Brewer, lately appointed associate justice of the supreme court of the United States, in the case of *Howard v. Railroad Co.* (1886), 26 Fed. Rep. 837: 'Neither can it be said that Ryan and decedent were engaged in a different class of work. * * * True, they were on different trains, and at the time of the accident had no opportunity of noticing the conduct of each other until too late to prevent the collision. But, being engaged in the same kind of service, they must naturally have been often thrown into contact, and had ample opportunities for mutual supervision. * * * He who engages in train service knows that other trains besides his will be running, and may fairly be considered as contracting to take the risk of the negligence of the employees managing such trains. He must expect to be employed now on one train and now on another, to be thus thrown into contact with the other employees in that service, to know himself what is proper care in such work, and be able to detect any evidence of carelessness on the part of those in like service.' See *Howard v. Railroad Co.*, 26 Fed. Rep. 837; *Newport News & M. V. Co. v. Howe*, 3 C. C. A. 121; 52 Fed. Rep. 362; *Railroad Co. v. Donnelly* (Va., 1892), 14 S. E. Rep. 692."

On the other hand, in *Daniel v. Chesapeake & O. R. Co.*, 36 W. Va., 397; 15 S. E. Rep. 162, it was held that when a conductor, in charge of a railroad train, with a right to command and to control its movements, leaves his engine and train standing on the track of the main line, along which a train, due, and expected by him, has a right at that time to pass, and such conductor fails to use ordinary care to warn or notify in any way the expected train of such obstruction in its way, whereby a collision takes place, and a brakeman on the coming train is injured, and such negligence of the conductor is the direct and proximate cause of such injury, such brakeman being without fault or the means of preventing such negligence, or of avoiding its consequences, such brakeman is not the fellow servant of the conductor, and the company will be held responsible for the injury to the brakeman, caused by the negligence of the conductor in such manner. The opinion contains an elaborate examination of authorities.

5. Members of different train crews.—In the recent case of *Louisville & N. R. Co. v. Raines* (Ky.), 23 S. W. Rep. 505, it is held that a locomotive engineer who is injured by a collision with another train, caused by the negligence of the men in charge of the other train, may recover against the railroad company, as trainmen on different trains are not fellow servants. In this case a freight train had broken in two, and the train on which plaintiff was engineer was following. Owing to the failure of the employees on the first train to give the proper signals a collision seemed imminent, and plaintiff, after doing what he could to avert the accident, jumped from his cab and received the injuries complained of. The court says: "It is settled that an employer is not answerable in damages to one employe for injuries caused by the carelessness of another while both are engaged in the same service, and the injured servant is not

under the control and direction of the careless servant, but both are coequals in the service. The reason for the rule is that coequal servants in the same service are the agents of each other, and each must assume the ordinary risks in reference to the other in the performance of the same service. But when one employer has employes engaged in different departments of the same service, and the service in each department is distinct and separate from that of the other, and neither controlled by the other, but by its own employes, as in the case of the service of different railroad trains, operated by the same company, then the rule is different, and the employes belonging to each train and rendering service thereon are not fellow servants with the employes of the other train in the sense that the one is the agent of the other, and assumes the ordinary risks in reference to the manner that the employes on the other train discharge their duty. In such case the employment is several, and the employes of each train occupy such position in the service with reference to employes of the other train as precludes their having any control over their actions, or right to advise, even, as to the manner in which the service is to be performed. See *Railroad Co. v. Ackley*, 87 Ky. 282, 8 S. W. Rep. 691. And in *Railroad Co. v. Cavens*, 9 Bush, 559, the court says: 'If Cavens, the person killed, had been with Armstrong, the negligent conductor, and in condition, by reason of his equality with him as an employe, to watch over and provide against his negligence, the reasons then for refusing to make the company liable would apply; but when on different trains, and with no opportunity to exercise this watchful care over each other, the reason for releasing the company from responsibility ceases to exist, and in such case those controlling and directing the movement of one train with reference to those upon another train must be regarded as the agents of the company,' and of course not of each other. These two cases are directly in point, and impliedly overrule, in the particular now at issue, the cases of *Railroad Co. v. Collins*, 2 Duv. 114, and *Railroad Co. v. Robinson*, 4 Bush, 507. And we now adhere to the rule laid down in the Cavens and Ackley Cases, and expressly overrule Collins and Robinson Cases in the particular mentioned."

On the other hand, trainmen on different trains were held to be fellow servants in the following cases: *Relyea v. Kansas City, etc., R. Co.*, 112 Mo. 86; 20 S. W. Rep. 480; *Norfolk & W. R. Co. v. Donnelly's Adm'r*, 88 Va. 853; 14 S. E. Rep. 692. In the former case a brakeman of one freight train was held to be the fellow servant of a fireman on another freight train on the same railroad. In the latter, the engineers of different trains were held to be fellow servants.

6. Members of same train crew.—The engineer, fireman and brakeman of the same train are fellow servants of each other. *East Tenn., Va. & G. R. Co.*, 89 Tenn. 114; 14 S. W. Rep. 1077; *South Florida R. Co. v. Price* (Fla.), 13 So. Rep. 638.

7. Train hand and car repairers and inspectors.—A car inspector, while performing his duty, stepped between two cars standing on a track on which other cars were shunted by other employes of defendant. A competent brakeman was present, who neglected his duty to be on such shunted cars, and they collided with a car being inspected, causing the death of the inspector. Held, that the failure of the brakeman to be on the shunted cars was the

negligence of a coservant. *Potter v. New York Central, etc., R. Co.*, 136 N. Y. 77; 82 N. E. Rep. 603.

One who is employed by a railroad company, under a foreman, to make repairs in its repair shops and on cars standing in its yards, is not a fellow servant of a switchman, who, under orders of the yard-master, directs the movement of cars in the yard. *Pool v. Southern Pac. R. Co.*, 7 Utah, 303; 26 Pac. Rep. 654.

Plaintiff's decedent, a car-repairer, while engaged in removing a broken brake-beam, and assisting to couple the car with a chain, so that it could be set out for repairs, was killed by the unexpected movement of the engine. The court charged, in an action against the railroad, that fellow servants were such as directly cooperate with one another in the same department of service, or such that their usual duties bring them into habitual association; and that plaintiff was entitled to recover, if the engineer was employed in a department separate and distinct from that in which decedent was employed, and if the latter's death was the result, not of his own negligence, but that of the engineer in moving his engine without warning. Held, that such instructions were proper. *Webb v. Denver & R. G. R. Co.*, 7 Utah, 363; 26 Pac. Rep. 263. To same effect, *Louisville & N. R. Co. v. Davis*, 91 Ala. 487; 8 So. Rep. 552.

A railway company is responsible to a switchmen in its service, who is injured by the breaking of a defective coupling link, for the negligence of its car inspectors, in failing to discover and remedy the defect in the link. *Little Rock, etc. R. Co. v. Moseley* (Ct. of App.), 56 Fed. Rep. 1009. But see *Dewey v. Detroit, etc., R. Co.* (Mich.) 56 N. W. Rep. 756.

8. Train hand and telegraph operator.—A telegraph operator at a way station, whose duty it is, under the general rules of the railway company, to display signals to prevent one train following another on the same track too closely, is the fellow servant of a locomotive fireman, injured in a collision caused by the operator's neglect of such duty. *Cincinnati, etc., R. Co. v. Clark* (Ct. of App.), 57 Fed. Rep. 125. To the same effect is the case of *Reiser v. Pennsylvania R. Co.*, 152 Penn. St. 38; 25 Atl. Rep. 175, where it was held, that in an action against a railroad company for the death of a fireman, caused by the negligence or incompetency of one of defendant's telegraph operators, the two were fellow servants and that evidence that the operator was not qualified for the place is not sufficient to charge the company, where it does not appear that it knew, or by reasonable diligence could have known, of such incompetency.

WRIGHT v. LEE ET AL.

(Supreme Court of South Dakota, March 16, 1892. On rehearing. July 29, 1893.)

1. FOREIGN CORPORATIONS. RIGHT OF BONA FIDE CREDITORS TO CONTEST VALIDITY OF A GENERAL ASSIGNMENT BY CORPORATION. A *bona fide* creditor can contest the validity of an assignment made for the benefit of creditors by a corporation, upon the ground that it has never been authorized by or duly

executed by a duly elected board of directors, or upon the ground of fraudulent intent upon the part of those executing it, or that the statutory requirements have not been complied with in order to make a valid assignment.

2. **VALIDITY OF ACTS DONE, AND CONTRACTS MADE BY A FOREIGN CORPORATION BEFORE COMPLYING WITH STATE LAWS AS TO DOING BUSINESS THEREIN.** The acts of a foreign corporation, which has not complied with the requirements of the constitution and laws of the state in relation to such corporation transacting business, owning and disposing of property, and, in case of insolvency, making an assignment of its property for the benefit of creditors, are not void and unenforceable, but such a foreign corporation may, in a direct proceeding instituted by the state, be prevented from exercising its franchises within the state until it has fully complied with the constitution and laws.

3. **Transacting business in the state by such noncomplying foreign corporation is a usurpation of power by such corporation, but with the state rests the right to elect whether it will acquiesce in such usurpation, or dispute and prevent it.**

4. **STATUS OF FOREIGN CORPORATION DOING BUSINESS BEFORE COMPLYING WITH STATUTE.** A corporation duly organized under the laws of another state, and publicly doing business in this state, without having complied with the statutory requirements above referred to, is, until its authority is challenged by the state, a *de facto* corporation. (On rehearing.)

5. **DESIGN AND PURPOSE OF SUCH STATUTES AS TO FOREIGN CORPORATIONS.** Article 17, § 6, of the constitution, and sections 3190, 3192, Comp. Laws, were not designed or intended as a prohibition upon foreign corporations to make lawful contracts in this state to the extent to declare such contracts void, but were merely intended to furnish the means by which citizens could procure personal judgments against them, and bring them and their property within the reach of the process and jurisdiction of our courts; thus protecting them from fraud and imposition, and affording adequate and speedy relief against either.

6. **VALIDITY OF ASSIGNMENT AS AFFECTED BY IRREGULARITIES IN ELECTION OF DIRECTORS MAKING IT. MEETINGS OF STOCKHOLDERS OUT OF STATE. ESTOPPEL.** When the stockholders of a corporation, after it has been duly organized within the state of its creation, meet without the limits of the state granting the charter, and elect a board of directors, a creditor who has had voluntary dealings with and otherwise recognized the validity of the corporation cannot object to the legality of such election. The parties thus elected are directors *de facto*, and the legality of their election cannot be inquired into collaterally, without showing a judgment against it, obtained in a direct proceeding for that purpose instituted by the state, denying it the right to exercise its franchise within the state.

7. **MEETINGS OF DIRECTORS OUT OF STATE. ESTOPPEL.** The directors are the agents of the corporation, not the corporation itself. Although they meet without the limits of the state creating the corporation, yet their proceedings will be valid and binding upon it. All persons who have had legitimate dealings with such corporation by its corporate name are precluded by their acts from denying the lawful existence of the corporation.

8. **POWER OF DIRECTORS TO MAKE A GENERAL ASSIGNMENT FOR BENEFIT OF CREDITORS.** A board of directors, empowered by the charter or articles of incorporation to manage and govern the affairs of a corporation, are properly qualified to make an assignment of the property of the corporation for the benefit of creditors, when it is in failing circumstances, without obtaining the sanction of the stockholders.

9. **STATUTORY REQUIREMENTS. SUFFICIENCY OF AFFIDAVIT TO ASSIGNMENT BY CORPORATION.** Section 4668, Comp. Laws, requires that an affidavit must be made by every person executing an assignment for the benefit of creditors, to the effect that the same is in all respects just and true, according to the best of such assignee's knowledge and belief. When the assignor is a corporation, and the affidavit attached to the inventory is made and sworn to by the president of the corporation, "that the inventory hereto annexed is in all respects just and true, to the best knowledge and belief of deponent," and that "deponent makes this affidavit on behalf of the company assignor," it is a sufficient compliance with the requisites of the statute in relation to the affidavit.

10. **EFFECT OF AMENDING INVENTORY WITHOUT A RE-FILING OR RE-VERIFICATION.** A portion of the inventory marked "G" contained a statement of some alleged difference said to be due the assignor from the Bank of South Dakota in the settlement of its account with that bank, which had been left out of the inventory when it was filed in the clerk's office. It was subsequently placed in its proper place in the inventory, by the president, without a special verification or filing. Held, in the absence of fraud in reference to this particular transaction, it was not such an irregularity as would render the inventory filed untrue or false, or vitiate it for the purpose for which it was filed.

11. **THE ASSIGNMENT MUST BE MADE IN GOOD FAITH TO BE EFFECTUAL THOUGH OTHERWISE IN COMPLIANCE WITH CODE.** Section 4660 *et seq.*, Comp. Laws, prescribe the manner of making, and declare the legal effect of, an assignment made under such provisions. It must be made "in good faith," and, when made, is subject to the Code provisions "relative to trusts and to fraudulent transfers."

12. An assignment not made "in good faith," or which would be invalid under the Code provisions "relative to trusts and fraudulent transfers," even though modally within the letter of the statute, is not effectual to protect the property assigned against the attacks of creditors by attachment.

Keith & Bates, Bailey & Stoddard, Miller, Noyes & Miller, and Joy, Hudson, Call & Joy, for appellants. *McMartin & Carland*, for respondent.

BENNETT, J.—This action was originally brought by the plaintiff, as assignee of the La Belle Ranche Horse Importing Company, to recover for the alleged conversion by the defendant William Lee, as sheriff of Lake county, certain goods, merchandise, and property, taken by him from the possession of the plaintiff, the same being the assigned property. The balance of the defendants

are the indemnitors of the sheriff. The defendants in their answer justify the taking of the property by the sheriff under several attachments and executions against the assignor. The answer sets forth the proceedings taken to procure the attachments, showing a compliance with the statutory conditions pertaining to the issuing of those processes; also the proceedings in the circuit court against the assignor in several actions whereby judgments were regularly obtained against it. The answer further alleges that the plaintiff had no other right, title, or interest in said property, or any part of it, except that alleged to be derived from a certain assignment made by the assignor on the 10th day of January, 1890, and that said assignment is void as to all *bona fide* creditors—First, because the assignor was a foreign corporation which had not complied with the constitution and laws of this state in relation to such corporations; second, because the alleged assignment was not authorized by the stock-holders of the corporation, nor executed by a duly elected or qualified board of directors of the corporation; third, because it was fraudulent, and was made to hinder, delay and defraud creditors; fourth, because no inventory was ever filed, or affidavit made and attached to it, as required by law.

At an early stage of the trial, and before the defendants had entered upon their defense, the court ruled, on several objections to the introduction of evidence, in substance, that the defendants would not be permitted to raise any question as to the validity of the assignment, and all questions relating to its validity were withdrawn from the jury. At the conclusion of the evidence the court instructed the jury that "for the purposes of this case, in this court, the ruling has been, and it will govern you, that this assignment is valid in all respects; that George L. Wright was the owner, by reason of that assignment of the property on the 4th day of February, 1890, and is entitled to recover from William Lee and the American Exchange Bank, who indemnify and acted with him in the seizure of the property, whatever you, in your judgment, shall find that property was worth." Whatever doubt may arise as to whether a foreign corporation can make a valid assignment of its property in a state where it has not complied with the constitution and laws of that state in relation to doing business in it, and as to whether that question can be raised

by parties who have recognized the validity of the corporation by dealing with it, there certainly can be no question of the right of a *bona fide* creditor of such corporation to contest the validity of such an assignment upon the ground that it has never been authorized by, or duly executed by a duly elected board of directors, or signed by the proper officers of the corporation; or, if so authorized and properly executed, that the fraudulent intent in making it may not be inquired into; or, if neither of these, that the statutory requirements have not been complied with in order to make a valid assignment. A corporate body, as well as a private individual, when in failing circumstances and unable to redeem its paper or pay its debts, may, even without any statutory provisions and upon general principles of equity, assign its property to a trustee, in trust to collect its debts, pay and distribute its assets to lawful creditors, and may exercise that right to the same extent and in the same manner as a natural person, unless restricted by its charter or some statutory provision. *Catlin v. Bank*, 6 Conn. 233; *Buell v. Buckingham*, 16 Iowa, 285; *Ringo v. Bisco*, 13 Ark. 563; *Ang. & A. Corp.* (10th Ed.), § 191; *Covert v. Rogers*, 38 Mich. 363; *Shockly v. Fisher*, 75 Mo. 498. When an assignment has been made by either a private individual or corporation, in case of apparent fraud or illegality, the course is sometimes adopted by creditors of treating it as a nullity, and proceeding as though it had not been made, or it may be assailed by a direct proceeding in a court of competent jurisdiction, for the express purpose of having it judicially declared to be void. The assignment in the case at bar was treated by the attaching creditors as a nullity.

The first question for consideration will be, can the La Belle Rancho Horse Importing Company, being a foreign corporation which has not complied with the constitution and laws of the state of South Dakota in relation to such corporations, transact business, own and dispose of property, and in case of insolvency, make within this state a valid assignment of its assets for the benefit of its creditors? It is conceded that this company has made no attempt to comply with the provisions of the constitution or the statutes in relation to foreign corporations, and the proofs show that, for over four years prior to the making of the alleged assignment in question, the assignor of the plaintiff, in defiance of the

laws of the state, transacted a large portion of its business, amounting to many thousands of dollars, within this state. No business was done by the company in the state of Minnesota, where it was incorporated, excepting holding an occasional stockholders' meeting at a room in some hotel, or at the office of some attorney in the town of Albert Lea. In all respects the ordinary business of the corporation was transacted in this state, the same as it would have been done if it had been formed under its laws. The alleged assignment was made in South Dakota by officers elected at a meeting of directors held in this state. It is generally conceded as law that no state has the power to create corporations, or to regulate their powers, or to authorize the exercise of corporate franchises in another state. It may confer powers in the nature of a commission, to be exercised anywhere upon condition that their exercise be assented to by the state or sovereignty where their exercise is sought; but without this assent, express or implied, such powers would be nugatory outside the state granting them. Each state, by its own legislature, must determine for itself all such questions of public policy arising within its limits.

But upon the principle of comity, which is a part of the voluntary law of nations recognized, to a greater or less extent, by all civilized governments, effect is frequently given in one state or country to the laws of another in a variety of ways, especially upon questions of contracts, rights of property, and rights of actions connected with or depending upon such foreign laws. If this were not done, commercial and business intercourse between the people of different states and countries could scarcely exist. Among the states of the Union, the relations and intercourse of its citizens are more intimate than those of what may be more strictly called "foreign states." Commercial and business enterprises can scarcely be called "foreign intercourse." State lines are not regarded by the people as much more than county or township lines, where they define a public policy or one in which the welfare of the general people is at stake. If we read aright, such has been the general course and tendency of the judicial decisions in the several states. Especially has this comity been generally admitted and administered in reference to corporate rights and interests. The rule seems to be well settled that the corporate existence, rights of making and enforcing contracts, of acquiring property

and transacting business, (not requiring the exercise of official corporate action), of a corporation created by the laws of one state, will be recognized and protected in another, subject only to the qualification that the enjoyment and exercise of such rights shall not be contrary to the laws or settled policy of the state in which they are sought to be enjoyed or exercised, or prejudicial to the interests of such state or its citizens. As was well observed by Judge Story in his *Conflict of Laws*, §§ 35, 37, in reference to questions of this kind, wherein he fully approves of the principles announced by the supreme court of the United States in the case of *Bank v. Earle*, 13 Pet. 589: "In the silence of any positive law affirming or denying or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy or prejudicial to its interests. It is not the comity of the courts, but the comity of nations (states), which is administered and ascertained in the same way, and guided by the same reasoning, by which all other principles of municipal law are ascertained and guided."

As the question is not, then the comity of the courts, but that of the state, and is upon the adoption or qualified adoption in the state of the laws, or, rather the incidents growing out of the laws, of Minnesota in relation to corporations, it follows that the power of determining the question whether and how far, or with what modification, or what conditions, the laws of that state, or any right depending upon them, shall be recognized here; belongs to the legislature or law making power; and that the judiciary whose province is to declare the law, and not make it, must be guided in their decision by the principles and policy adopted by the legislature in reference to the question; and in ascertaining what the legislative policy is, we must be guided, not only by such express provisions as they have chosen to make, and the natural implication from them, but also by what has not been expressed in the enactment. *Williams v. Creswell*, 51 Miss. 818. A corporation, being the creature of positive law, has such powers as are conferred upon it, and it can make any lawful contract, expressly or by necessary implication, authorized by its charter. In the case at bar it is not claimed but that the company had the power to make contracts in relation to holding property, buying

and selling the same, and could, by its agents, enter into other states than that of its domicile. If, then, it is claimed that a foreign corporation cannot make a lawful contract in this state which is within the scope of its corporate power, we must be referred to some positive law declaring a prohibition or regulating that right. The appellants' contention is that the constitution and the statutory laws prohibit foreign corporations from doing business in this state until they have complied with the terms of admission, and that all contracts made before such compliance are void. The constitution of the state provides that "no foreign corporation shall do any business in the state without having one or more known places of business, and an authorized agent in the same upon whom process may be served." Article 17, § 6. The provisions of the Compiled Laws of 1887, in regard to the transaction of business within the state by foreign corporations, are as follows: "Sec. 3190: No corporation created or organized under the laws of any other state or territory shall transact any business within this territory, or acquire, hold, and dispose of property, real, personal, or mixed, within this territory, until such corporation shall have filed in the office of the secretary of the territory a duly authenticated copy of its charter or articles of incorporation, and shall have complied with the provisions of this article: provided, that the provisions of this act shall not apply to corporations or associations created for religious or charitable purposes solely." "Sec. 3192. Such corporations shall appoint an agent who shall reside at some accessible point in this territory, in the county where the principal business shall be carried on, duly authorized to accept service of process, and upon whom service of process may be made in any action in which said corporation may be a party; and service upon such agent shall be taken and held as due service on such corporation. A duly authenticated copy of the appointment or commission of such agent shall be filed and recorded in the office of the secretary of the territory and register of deeds of the county where said agent resides, and a certified copy thereof by the secretary or register of deeds shall be conclusive evidence of the appointment and authority of such agent."

In support of the contention of the appellants we are cited to a large number of decisions based upon statutes similar to the

one above quoted. Among the first that was rendered, and which has now become the leading case, is that of *Bank v. Earle*, 13 Pet. 588. Chief Justice Taney, in delivering the opinion of the court, said: "A corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law, and when that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty. But, although it must live and have its being in that state only, yet it does not by any means follow that its existence will not be recognized in other places, and its residence in one state creates no insuperable objection to its contracting in another. * * * It is sufficient that its existence as an artificial person in the state of its creation is acknowledged and recognized by the laws of the nation where the dealing takes place, and that it is permitted by the laws of the place with which it is endowed. Every power, however, of the description of which we are speaking, which a corporation exercises in another state, depends for its validity upon the laws of the sovereignty in which it is exercised, and a corporation can make no valid contract without their sanction, express or implied." In Oregon, section 8, of the act of October 21, 1864, provides: "A foreign corporation, before transacting business in this state, must duly execute and acknowledge a power of attorney, and cause the same to be recorded in the county clerks, office of each county where it has a resident agent." The purpose of this requirement is declared in the ninth section of the act to be to secure the appointment of an attorney authorized to receive service of process so as to enable the citizens or inhabitants of Oregon to sue in the courts of that state, thereby avoiding delay and expense in any litigation that may be necessary with such foreign corporations. This law was construed by the United States court for the district of Oregon in the case of *In re Comstock*, 3 Sawy. 218. In that case, Judge Deady, in an exhaustive opinion, says: "Two questions appear to rise. (1) Does the Oregon statute prohibit the transaction of business therein by a foreign corporation until its requirements are complied with? (2) Is the assignee estopped to show a want of compliance with the statute because the bankrupts were parties to the transaction al-

leged to have been done in violation of it?" After stating the principles of law in relation to foreign corporations transacting business outside their own domicile, as laid down in *Bank v. Earle*, and Story in his *Conflict of Laws*, *supra*, and those approved by Mr. Justice Field in *Paul v. Virginia*, 8 Wall. 181, and in the case of *Lafayette M. Co. v. French*, 18 How. 407, and *Ducat v. City of Chicago*, 10 Wall. 410, he says: "The bank, then, has no power to make a contract within this state without its permission or assent. If the state is silent on the subject, by the comity of nations its permission is presumed, unless it would be contrary to its policy or interest. But the state has spoken on the subject, and given its consent to the transaction of business within its jurisdiction by the bank, not absolutely, but upon condition or a limitation. This condition or limitation is found in the first clause of section 8 of the act aforesaid. * * * The state, having this right to permit the bank to do business within its limits or not, with or without terms, has seen fit, for the security of its citizens, to require the execution and record of this power of attorney before the transaction of such business. * * * It follows, from these premises, that the bank had no power to contract in the state until it had complied with the terms upon which the permission to do business was granted. It was required to perform the condition before it transacted business. But it is said that this statute is directory, and therefore the acts of the foreign corporation, done in disregard of it, are not illegal and void. It is the duty of a court to give effect to the intention of the legislature as far as practicable, and such intention should be ascertained from the words used in the statute, and the subject matter to which it relates. The words of this act are certainly mandatory in form. Before transacting any business the corporation must appoint an attorney. Language could not be plainer. The purpose of the act is apparent. As has been said, it is to secure the people of the state the right to sue the foreign corporation in the courts of the state; but, unless the attorney is appointed before the business is transacted, it will not be attained." The court then held the contract under consideration illegal and void. In the case of *Semple v. Bank*, 5 Sawy. 88, Judge Deady, again construing the same statute, reaffirmed his former decision, in more emphatic terms, if possible.

In the case of *Bank v. Page*, 6 Or. 431, the supreme court of Oregon passed upon the same statute, and upheld it, and said: "We regard all these provisions of the statute wise and necessary, and we think they should be so construed as to give them force and effect. It was suggested in the argument of this case that a contract, made in violation of some of its provisions, is not necessarily void. Some authorities were cited which give countenance to this view of the law. We think that in some cases it may be true. The general rule is that a contract in violation of law is void." These decisions upon the Oregon statute have been reaffirmed in the case of *Insurance Co. v. Elliott*, 7 Sawy. 18; 5 Fed. Rep. 225, and in the case of *Hacheny v. Leary*, 12 Or. 40; 7 Pac. Rep. 329.

In Illinois it was enacted that "it shall not be lawful for any agent or agents of any insurance company incorporated by any other state than the state of Illinois, directly or indirectly, to take risks or transact any business of insurance in this state without first producing a certificate of authority from the auditor of the state." Public Laws of 1855, p. 46. The statute also imposed a penalty for a violation of its provisions. The supreme court held that a promissory note, given to an insurance company which had not complied with the statute, was void, and could not be enforced. *Assurance Co. v. Rosenthal*, 55 Ill., 85, 91. Justice Walker, in delivering the opinion, says: "When the legislature prohibits an act, or declares that it shall not be lawful to perform it, every rule of interpretation must say that the legislature intended to interpose its power to prevent the act, and, as one of the means of its prevention, that the courts shall hold it void. This is as manifest as if the statute had declared that it should be void." See, also, *Pierce v. State*, 106 Ill. 11.

The same rule was applied in Wisconsin, under a similar statute. *Insurance Co. v. Harvey*, 11 Wis. 394. In Indiana an act applicable to foreign corporations provides that "such foreign corporations shall not enforce in any of the courts of this state any contract made by their agents or by persons assuming to act as their agent, before compliance * * * with the provisions of sections 1 and 2 of this act." It was decided by the supreme court that, while contracts made with foreign corporations which had not complied with the statute were valid, the cor-

poration could not sue on such contracts until after the statutory requirements had been fulfilled, and that the company's right to sue must be pleaded in abatement. *Mowing, etc., Co. v. Caldwell*, 54 Ind. 270; *Smith v. Little*, 67 Ind. 549; *Daly v. Insurance Co.* 64 Ind. 1; *Manufacturing Co. v. Efflinger*, 79 Ind. 264; *Elston v. Piggott*, 94 Ind. 14. This act was superceded, as to foreign corporations, by the act of 1865, which prohibited such companies and their agents from doing business within the state until certain conditions had been complied with, and a certificate obtained from the auditor of the state. It was decided by the supreme court that this statute did not merely affect the right to sue in the courts of the state, but that contracts made before complying with the prescribed conditions were absolutely void by force of the statute. *Hoffman v. Banks*, 41 Ind. 1; *Insurance Co. v. Thomas*, 46 Ind. 44. In Massachusetts, Pennsylvania, Michigan, and Kentucky, a similar doctrine has been laid down in their courts construing statutes relating to foreign corporations. *Roche v. Ladd*, 1 Allen, 436; *Insurance Co. v. Pursell*, 10 Allen, 231; *Williams v. Cheney*, 3 Gray, 215; *Insurance Co. v. Harvey*, 11 Wis., 394; *Brackett v. Hoyt*, 29 N. H. 264; *Buxton v. Hamblen*, 32 Me. 448; *Bancroft v. Dumas*, 21 Vt. 456; *Thorne v. Insurance Co.*, 80 Pa. St. 15; *Scott v. Duffy*, 14 Pa. St. 20; *Insurance Co. v. Stoy*, 41 Mich. 385; 1 N. W. Rep. 877; *Pierce v. State*, 106 Ill. 11; *Franklin Ins. Co. v. Louisville & A. Packet Co.*, 9 Bush, 590.

State statutes imposing restrictions upon foreign corporations have been held valid by the supreme court of the United States, unless the limitations or conditions arise when a corporation is in the employ of the federal government, or where its business is strictly commerce, interstate or foreign. *Milling Co. v. Pennsylvania*, 125 U. S. 181; 8 Sup. Ct. Rep. 737; *Lumber Co. v. Thomas (W. Va.)*, 11 S. E. Rep. 37; *Manufacturing Co. v. Ferguson*, 113 U. S. 727; 5 Sup. Ct. Rep. 739.

While the general rule is that a contract prohibited by statute is void, and if a statute provides a penalty for doing an act any contract under such a statute is invalid, whether it be so declared or not, yet, as Judge Frazer says in the case of *Deming v. State*, 23 Ind. 416: "The rule is properly applied only where the reason upon which it is founded exists. The law ceases with the

reason thereof, and it is a grave error to regard it as a merely arbitrary rule, applicable to all contracts which are prohibited by statute. It is generally applicable because the thing prohibited is immoral or against public policy." In *Insurance Co. v. Robinson*, 25 Ind. 539, Gregory, J., in delivering the opinion, says:

"It is urged in argument that the complaint is bad for not showing a compliance by the local agent of the company with the requirements of the act respecting foreign corporations and their agents." "It is contended, under the law, that all contracts of foreign corporations are void, and that the exception to the rule is when they comply with its provisions. * * * We do not so regard that statute." The opinion then speaks approvingly of the principle asserted touching contracts prohibited by statute, and then proceeds: "It would seem to follow that the contracts of a foreign corporation, made in violation of a statute made for the protection of our citizens, would not, as to the latter be void."

Thus it will be seen that there are many exceptions to the general rule, and the question is, how shall a court determine whether a case is within or without the rule? In the case of *Harris v. Runnels*, 12 How. 79, Mr. Justice Wayne, in delivering the opinion of the court, said: "That legislators do not think the rule of universal obligation, or that upon grounds of public policy it should always be applied, is very certain; for, in some statutes, it is said, in terms, that such contracts are void; in others, that they are not so. In one statute there is no prohibition expressed, and only a penalty; in another, there is prohibition and penalty, in some of which contracts in violation of them are void or not, according to the subject matter and object of the statute; and then there are other statutes in which there are penalties and prohibitions in which contracts made in contravention of them will not be void, unless one of the parties to them practices fraud upon the ignorance of the other. It must be obvious from such diversities of legislation, that statutes forbidding or enjoining things to be done, with penalties accordingly, should always be examined before courts should refuse to give aid to enforce contracts which are said to be in contravention of them."

In the case of *Pangborn v. Westlake*, 36 Iowa, 548, Justice Cole says; "We are therefore brought to the true test, which is that while, as a general rule a penalty implies a prohibition, yet

the courts will always look to the language of the statute, the subject matter of it, the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished in its enactment; and if, from all these, it is manifest that it was not intended to imply a prohibition or to render the prohibited act void, the courts will not so hold and construe the statute accordingly." See, also, *Howell v. Stewart*, 54 Mo. 400; *Bank v. Hale*, 59 N. Y. 53; *Manufacturing Co. v. Ferguson*, 113 U. S. 727; 5 Sup. Ct. Rep. 739; *Sherwood v. Alvis* (Ala.), 3 South. Rep. 308. The case of *Bank v. Matthews*, 98 U. S. 628, was where a national bank had accepted a note and a deed of trust as security for a loan of money, contrary to the provisions of the national banking act. Justice Swayne, in delivering the opinion, says: "The statute does not declare such security void. It is silent upon the subject. If congress so meant, it would have been easy to say so, and it is hardly to be believed that this would not have been done, instead of leaving the question to be settled by the uncertain result of litigation and judicial decision. * * * When a corporation is incompetent by its charter to take title to real estate, a conveyance to it is not void, but only voidable, and the sovereign alone can object. It is valid until assailed by a direct proceeding instituted for that purpose. * * * The impending danger of judgment of ouster and dissolution was, we think, the check, and none other, contemplated by congress. That has always been the punishment prescribed for a wanton violation of a charter, and it may be made to follow whenever the public authority shall see fit to invoke its application. A private person cannot, directly or indirectly usurp the functions of the government." To the same effect is the case of *Bank v. Whitney*, 103 U. S. 101, with this additional declaration, that, "whatever objection there may be to it as a security for such advances from the prohibitory provisions of the statute, the objection can be only urged by the government;" citing *Fleckner v. Bank*, 8 Wheat. 338.

From these cases, and many others which could have been produced while there is some conflict on the question, it appears that what the legislature meant in the enactment of the statute in relation to foreign corporations is to be inferred from an examination of the entire act, and the intention, in every instance is to be the guide to a court in determining whether the particular case

should form an exception to the general rule. That intention may be inferred from all its provisions in connection with the subject-matter and circumstances. The object sought to be accomplished exercises a potent influence in determining the meaning of not only the principle, but the minor provisions of a statute. To ascertain it fully, a court will be greatly assisted by knowing the mischief intended to be removed or suppressed, or the necessity of any kind which induced the enactment. In the cases above cited and in fact all to which our attention has been called by the very able briefs upon the part of the appellants and respondent all say the objects of the statute under consideration are to place foreign corporations, within the reach of the process of the courts in the jurisdiction where the corporation is doing business and to protect parties doing business with them from imposition and that the primary object is not to render their acts absolutely void. This object is clearly stated by Morawetz, in his work on Corporations (2d Ed.), § 665, as follows: "The object of the various statutes providing that foreign corporations, before transacting business, shall comply with specified conditions such as filing copies of their charters, making statements of their financial condition, appointing agents upon whom process shall be served, etc., is to protect parties dealing with them from imposition, and to secure convenient means of obtaining jurisdiction in the local courts. These statutes place foreign corporations in the same position as domestic corporations in the particulars provided for. It is clearly not the primary purpose of the legislature in passing these statutes to render the contracts and dealings of corporations which have not complied with the statute void and unenforceable. Hence, when the legislature has not expressly declared that this result shall follow from a failure to comply with the statute, the courts ought not to imply such a result, unless this be necessary in order to attain the primary object for which the statute was passed." This, we think, is the better and more reasonable construction of these statutes, and, unless the statute prescribing the prerequisites to the right to do business declares that contracts made by foreign corporations shall be void, the courts should not declare them to be so absolutely.

In the decisions holding the acts of a foreign corporation void when done in violation of constitutional or statutory prohibition,

and when no penalties are provided for, great stress and force is placed upon the fact that to hold the acts valid would render the enactment nugatory, as there would be no way to enforce it. With this contention we cannot agree, especially within our jurisdiction. It is provided by section 5346, Comp. Laws, that an action may be brought by any state's attorney in the name of the state, on leave granted by the circuit court or a judge thereof, against any corporation, when it is claimed that it has or is exercising a franchise or privilege not conferred upon it by law. It appears from the record in this case that the La Belle Rancho Horse Importing Company is a corporation organized under the laws of the state of Minnesota, and the appellants contend that *quo warranto*, or an information in the nature of *quo warranto*, or the civil action provided by statute, cannot be maintained against it in this state, because it can be ousted of its franchises only by the sovereignty which bestowed them. Undoubtedly, the franchises which a state has conferred upon a corporation cannot be taken from it by the act of another state or by the judgment of its courts. The purpose of this action, however, is not to deprive the corporation of the franchises with which it is endowed and invested by the laws of the state creating it, but to inquire into its authority to carry on its business in this state, and, if found to be exercising its franchises in this state in contravention of the laws thereof, to oust it therefrom. There can be no doubt of the power of the legislature to prescribe the terms and conditions upon which a foreign corporation may do business in this state. That consent may be upon such terms and conditions as the legislature, under its law-making power, may impose, and they may be excluded altogether, if thought to be wise. Before exercising their franchises, such corporations must comply with the conditions imposed. Without such compliance, the exercise of their franchises in the state would be in contravention of the laws of the state, and the statute above quoted expressly authorizes an action by the state's attorney to determine the question. This statute is not limited to corporations organized under the laws of South Dakota, but applies to all corporations generally. We therefore hold that all corporations which are carrying on business in this state without complying with the laws, whether domestic or foreign, are exercising their corporate franchises in con-

travention of the law. The proper judgment in the case of a foreign corporation would be, as was said in the case of *State v. Insurance Co.*, 47 Ohio St. 180; 24 N. E. Rep. 392, "not to oust the corporation from the franchise of being a corporation, or from any of the franchises conferred on it by the law of its creation but from the exercise of its franchise in this state." See, also, *State v. Insurance Co.*, 39 Minn. 538; 41 N. W. Rep. 108; *State v. Railroad Co.*, 25 Vt. 433; and *People v. Trustees*, 5 Wend. 211. Aided by the light of these able decisions, endeavored to be reviewed upon both sides of the question raised in the case at bar, we have come to the conclusion that the constitutional provision and legislative enactment in our state, as quoted above, was not designed or intended as a prohibition upon foreign corporations to contract in this state, to the extent to declare such contracts void, but was merely intended to furnish the means by which our citizens could procure personal judgments against foreign corporations who were their debtors. And while the statute did in terms prohibit the transaction of business until its provisions are complied with, yet, whatever objection there might be made to a foreign corporation for non-compliance, it being a statute regulating a public policy, this objection could not be urged collaterally by a private person, but it must be done by a direct proceeding instituted by the state. Following a well-known and established uniform rule, if a person contracts with a corporation in a matter within its corporate powers, the mere making of such contract estops the promisor from disputing the corporation's regular and complete right to make such a contract. The distinction is between an entire absence of authority in the charter itself and a failure to comply with some prerequisite which the law has made a condition precedent to the exercise of corporate functions. In the one case, there is want of power to act; in the other, only an abuse of power conferred.

The case of *Smith v. Sheeley*, 12 Wall. 358, seems to us to be one in point. The main question considered and decided was whether the Nehama Valley Bank, of Omaha, Neb., could be a lawful grantee of a lot of land. While Nebraska was only a territory, its legislature had incorporated the bank, but the act of incorporation was never approved or confirmed by congress. By an act approved July 1, 1836, congress enacted "that no act of

the territorial legislature of any territory of the United States, incorporating any bank or any banking institution with banking powers or privileges, shall have any force or effect whatever until approved and affirmed by congress." This act was in force when the territorial legislature incorporated the Nehama Valley Bank. The court, by its unanimous opinion, said: "It is insisted, however, as an additional ground of objection to the deed, that the bank was not a competent grantee to receive title. It is not denied that the bank was duly organized in pursuance of an act of the legislature of the territory of Nebraska, but it is said that it had no right to transact business until the charter creating it was approved by congress. This is so, and it could not legally exercise its power until the approval was obtained. But this defect in its constitution cannot be taken advantage of collaterally. No proposition is more thoroughly settled than this, and it is unnecessary to refer to authorities to support it. Conceding the bank to be guilty of usurpation, it was still a body *de facto*, exercising, at least, one of its functions which the legislature attempted to confer upon it, and in such a case a party who makes a sale of real estate to it is not in a condition to question its capacity to take title after it has paid a consideration for the purchase." To the same effect are the decisions in the cases of Insurance Co. v. McMillen, 24 Ohio St. 67; Clark v. Middleton, 19 Mo. 53.

Again, bearing in mind that the object of the statute under consideration is to bring foreign corporations within the jurisdiction of the courts of our state, and to protect our citizens from imposition and fraud, and afford them adequate and speedy relief against either, we find in the case at bar that this reason did not exist. The record shows that from the time of its organization to the time of the assignment the corporation had a principal place of business and its executive officers within this state. No difficulty has been experienced in making personal service upon it, and in obtaining valid judgments against it, and its property has at all times been within reach of the processes of the courts. If the statute, which it is said has not been complied with, had been specifically fulfilled, no greater facility could have been afforded to carry out the object of the enactment. This corporation could therefore make a valid contract, hold and dispose of property, sue and be sued, and make an assignment of its property for the bene-

fit of its creditors when in failing circumstances, while acting in a *de facto* capacity within this state, until ousted by competent authority. The question of the non-compliance with the statute in relation to foreign corporations, as a condition precedent to transacting business, cannot be inquired into collaterally.

The next question demanding attention is, was the alleged assignment authorized by the stock-holders of the corporation, and executed by a duly elected board of directors, or signed by the proper officers of the corporation? It is conceded, or at least it is not denied, that the laws of the state of Minnesota contain no prohibition upon the corporation to transact business in this state, nor was there any prohibition as to transacting the business for which it was incorporated. The business of the corporation was such as was legal and legitimate, as well in the jurisdiction of its creation as in this state, excepting the prohibition that has been heretofore discussed: and there was nothing to interfere with the full operation of the law of comity between the states in relation to foreign corporations. A corporation only acts through its agents, and any act that can be performed by the directors of a corporation, who are only its agents, may be performed anywhere if the meeting of the directors is otherwise legal. By the articles of incorporation of the La Belle Rancho Horse Importing Company, we find that "the government of said corporation and the management of its affairs shall be vested in a board of directors, consisting of not less than three and not more than five, who shall be stockholders of and in said corporation." The board of directors, then, had the exclusive power to manage the business of the company. In such cases the sole right is in the directors, and not in the stockholders as such. As was said in the case of *McCullough v. Moss*, 5 Denio, 575, "when a charter invests a board with the power to manage the concerns of a corporation, the power is exclusive in its character. The incorporators have no right to interfere with it, and courts will not, even on a petition of a majority, compel the board to do an act contrary to its judgment. The stockholders, as such, in their collective capacity, could do no corporate act. The directors were their representatives, and alone authorized to act." It is, then, evident that a board of directors who are empowered to manage and govern the affairs of a corporation are properly qualified to make an assignment of the prop-

erty of the corporation for the benefit of creditors, when it is in failing circumstances, without obtaining the sanction of the stockholders to do so.

But in the case at bar it is alleged that the assignment was made by a board of directors who pretended to hold their office by virtue of an election by the stockholders of the company at a meeting held in the state of South Dakota, and outside of the state of its creation, and it is claimed that that action of the stockholders in such election was void. Morawetz on Corporations, in section 488, says that "there is no objection to shareholders meeting outside of the state, providing all the shareholders give their consent, and, in the absence of an express statutory prohibition, there appears to be no reason why shareholders in an ordinary business corporation should not provide in their articles of association that meetings may be called at convenient places outside of the state under whose laws the company is formed." The articles of incorporation do not expressly provide for stockholders meeting outside of the state of Minnesota, nor do they state where such meetings shall be held, but it is stated that the principal place of business shall be at Winfred, S. D. The record of the meetings at which these directors were elected shows that the stockholders of the corporation were present or represented, and that no objection was made to the meeting being held in Madison, S. D., or to the election of the directors, but at this meeting the action of the directors in making the assignment was unanimously approved. In support of the position assumed by the appellants, they rely principally upon the case of *Miller v. Ewer*, 27 Me. 517. A close investigation of that case, however, will show that the facts are not similar to the one at bar. In that case the first meeting of the stockholders for organization was held outside the limits of the state creating it, and no proof of the organization of the company or for the election of its officers had ever been held in the state of Maine. The court, under these circumstances, held the acts of its directors void upon the ground that the corporation had no valid organization. Not so in this case. The organization, as is shown by the record, was perfected in the state of Minnesota. Officers were elected and business transacted within that state. In the case of *Railroad Co. v. Mc-*

Pherson, 35 Mo. 13, which was an action by the corporation to recover the price of a stock subscription made by the defendant, the company was incorporated by an act of the legislature of Illinois, but it held some of its stockholders' and directors' meetings in the city of St. Louis, Mo., beyond the bounds of the state granting the charter. A recovery was resisted, among other things, by reason of this, and that the calls for stock assessments made in St. Louis, and votes cast and proceedings of stockholders and directors when assembled in that city were wholly void. In considering the question thus raised, the court said: "After the corporation had become full-fledged, I see nothing in reason or principle why the stockholders could not as well elect directors as the directors elect a treasurer on the Missouri side of the line. The most that could be said under such circumstances is that the election was irregular. The corporation having once been put into existence, if the members of the board of directors, whether charter members or their appointees or those elected by the stockholders in St. Louis, accepted their office and acted under their appointment or election, as the evidence shows was the case, they became *de facto* directors, and their authority to act on behalf of the corporation could not be questioned by the appellants in this collateral suit without showing a judgment of ouster against them in a direct proceeding by the government for that purpose."

The reasoning of this case seems to be conclusive. The laws of Minnesota, introduced in evidence, under which this company was incorporated, gave it the power to establish one or more offices without the state and to transact business thereat, provided that an office should always be maintained in that state where legal process may be served on the person in charge. The record also shows the incorporators met and organized at Albert Lea in the state of Minnesota, and that it continued to hold corporate meetings there down to nearly the date of the assignment. This would bring the case at bar within the ruling of the last case cited, and if the election of the board of directors who executed the assignment held by the stockholders on January 10, 1890, in Madison, S. D., was an irregularity, the question remains, who can take the advantage of it? As was held in the above case, this board were "*de facto*" officers. Still this term has led to some confusion by reason of the application of the same term to government officers

and public officials holding under color of right. See *Central Trust Co. v. Wabash, etc., R. Co.* 23 Fed. Rep. 858. But the term rests on different principles. Directors and other managers of a private corporation are mere agents, and the corporation can be charged with their acts only in accordance with the established doctrines of the law of agency. In *Dispatch Line v. Bellemey Manuf'g Co.*, 12 N. H. 223, Parker, J., said: "If the election had been by a municipal corporation coming into office under color of an election, he would have been an officer *de facto*, and his acts valid, so far as third persons had an interest in them. The regularity of the election could not in such a case be inquired into, except in some proceeding to which he was a party. As a director of a private corporation, although called, in common parlance, an officer of the corporation, he is not technically to be considered an officer *de facto*. He is one of the agents elected by the vote of the corporation for the management of its affairs, or some of them. But a similar rule must prevail in relation to the effects of his acts, so far as the corporation have held him out as an agent, and third persons have confided in his acts done within the scope of the authority he appears to possess." If this is the *status* of a director elected under such circumstances as would make the election an irregularity, it makes but little difference whether he is called an "officer *de facto*" or an "agent." If a corporation elect a person a director who is ineligible to that office, and permit him to act as such, the corporation will be bound by the acts which he performs within the scope of the authority possessed by a director, and, as his acts cannot be questioned by the corporation, they cannot be by those who claim under the corporation or collaterally. *McGargle v. Coal Co.*, 4 Watts & S. 425. The courts, as a rule, will not investigate the regularity of the election or appointment of an officer of a corporation when the corporation itself and the stockholders do not question the agents authority. *Association v. Baldwin*, 1 Metc. (Mass.), 359; 23 Fed. Rep. 858 *supra*; *Beecher v. Rolling Mill Co.*, 45 Mich. 103; 7 N. W. Rep. 695; *Sugar Co. v. Whitin*, 69 N. Y. 328. We, cannot, therefore, hold that the action of the stockholders had at their meeting held in Madison, S. D., January 10, 1890, in electing directors, was void, but, at the most, it could only be an irregularity which cannot be taken advantage of in a collateral proceeding. We must also

hold that an assignment made by the directors elected at such meeting, and in accordance with the stockholders' instructions, is valid as to third persons, unless successfully assailed upon other grounds than that of the irregularity of the election of the directors making it.

The validity of the assignment in the case at bar is assailed upon the ground that it was fraudulent, and made to hinder, delay, and defraud creditors. That the question of fraud and fraudulent intent in making an assignment can be litigated in a proceeding like this suit has been too often decided by the courts to be a matter of serious doubt or controversy. The allegation of the answer is that the assignment was fraudulent, and made to hinder, delay, and defraud the creditors of the company, and was made in pursuance of a conspiracy between the assignee and one Mosher to wreck the company and possess themselves of the property. Both the assignee and Mosher were directors of the company at the time the assignment was made. On the trial it appeared that the respondent and assignee was one of the original incorporators of the company, and was its secretary from its organization until the date of the assignment; and at the meeting of the stockholders in Madison he was elected a director, and declined to be re-elected secretary, because he wished to be made an assignee. It also appears that he was a creditor of the company, and there were unadjusted matters involving the title to valuable real estate between him and the company, and that he held title to real estate that belonged to the company upon which some of its most valuable improvements were located. There was also evidence tending to show that respondent and Mosher, another of the directors, had entered into an agreement to possess themselves of the property of the company in fraud of the rights of creditors and other stockholders. It was also shown on the trial that Mr. Mosher, one of the heaviest creditors and a director, was continuously urging the assignment, and threatening to attach the property if it was not made, and Wright was not selected as an assignee. Hartranft testified that Wright, the assignee, told him that he and Mosher were partners, and that he was paying half the bills, and that they were to "pull" together, and Mosher was to furnish the money to buy the stock at the sale, and they were to run the business together, and that he (Wright) would have a sale and sell the

property, and he and Mosher buy it in and be partners in the transaction. This is shown by the evidence of E. C. Gonsolus and J. N. Hartranft. On the trial, as is shown by the instruction of the court to the jury, quoted in the beginning of this opinion, all question as to the validity of the assignment were taken from the jury. We think, in the testimony of the above witnesses, and the circumstances surrounding the making of the assignment, that there was enough evidence introduced on the element of fraud to have had it submitted to the jury. Under our code of laws, actual fraud is always a question of fact. Civil Code, § 3509. "The great and indispensable requisite in all voluntary assignments by debtors is good faith; the great and fatal objection is fraud or the intent to defraud creditors. It is not enough that an assignment be for a valuable consideration. It must be *bona fide* also." Burrill, Assignm., § 330. What constitutes fraud is matter of law. What is sufficient evidence of the facts to require to establish it is for the jury to find. When fraud appears on the face of the assignment, it is so declared by the court. When dependent upon external proof it is to be found by the jury. We think the ruling of the court on this branch of the case was erroneous. The general rule is that when fraud is in issue, and there is any evidence tending to support it, the question of fact should be left to the jury.

The fourth ground upon which the assignment is assailed is that the assignor did not comply with the statutory requirements in relation to making a valid assignment, for the reason that no inventory and affidavit were ever filed as required by law. The law governing assignments for the benefit of creditors requires that the assignor shall make and file a true inventory of all the creditors; their place of residence; the sums owing to them, and the nature of the debt; the consideration of the liability; each existing judgment, mortgage, or other security; the exempted property of the assignor; and a list of all real and personal property, and its value, and all incumbrances on it. This must be done within twenty days after the assignment. The assignor must make an affidavit to be annexed to and filed with the inventory, that it is in all respects true and just, according to the best of the assignor's knowledge and belief. This assignment must be recorded, and the inventory filed, with the recorder of deeds of the

county where the assignor resides at the date of the assignment, or, if he did not reside in the state, with the like officer where the principle office is situated, or, if he had no residence or principal place of business, with a like officer where the principal part of the assigned property is situated. The statute also provides that, if these requirements are not fulfilled, the assignment shall be void against creditors of the assignor and against purchasers and incumbrancers in good faith and for value. Sections 4667-4671, Comp. Laws. To the inventory as filed, three objection were raised by the appellants: First, that the affidavit annexed to the inventory, as originally filed, did not comply with the provisions of the statute; second, that the inventory, as originally filed, did not contain the matters required by the statute to be contained in it; third, that the inventory, as finally filed with the additional matter, was wholly unverified.

The affidavit attached to the inventory was made by Charles E. Place, president of the assignor company, and states "that the inventory hereto annexed is in all respects just and true, to the best knowledge and belief of deponent," and that "deponent makes this affidavit on behalf of the company assignor." The contention of the appellants is that this affidavit is not in accordance with the provisions of the statute, for the reason that while the company was the assignor, the affidavit should have shown the inventory to be in all respects just and true to the best of the knowledge and belief of the assignor, while it only shows it to be in all respects just and true to the best knowledge and belief of Place himself. This position of appellant is clearly untenable. In the absence of legislative enactments or provisions made in the by-laws, corporations usually act through their president, or those representing him. He being the legal head of the body, when an act is performed by him, the presumption will be indulged that the act is legally done. *Mitchell v. Deeds*, 49 Ill. 417; *Kraft v. Printing Co.*, 87 N. Y. 628; *Crowly v. Mining Co.* 55 Cal. 278. In the case at bar, however, there is no need for the presumption, because the president of this company was especially authorized, in connection with the secretary, to execute this assignment. From this authority the conclusion is inevitable that they could make all necessary verifications to carry out his instructions. There can be no doubt that the board of directors may invest the

president with authority to execute any legitimate instrument within the scope of the power of the board. This may be done by an express resolution or by acquiescence in a general course of dealing. Mor. Priv. Corp. § 538.

At this point, however, we are met with a seeming difficulty which has been overlooked by the attorneys for both the appellants and respondent, or has been considered by them as of but little or no importance. But, inasmuch as the point might be urged as material on a new trial ordered, we have deemed it necessary to express our views upon it, although raised upon our own motion. The resolution of the board of directors authorizes and directs the president, C. E. Place, and the secretary to make and execute an assignment of the property of the company. The deed of assignment was executed, signed and acknowledged by both of them. No questions, then, can be raised in this particular to that instrument, but the affidavit to the inventory is made by C. E. Place alone. The question might arise whether the assignment was void because the inventory was not verified by the proper parties. Section 4668, Comp. Laws, says: "An affidavit must be made by every person executing an assignment for the benefit of creditors to be annexed to and filed with the inventory." Section 4671, id., says: "an assignment for the benefit of creditors is void against creditors of the assignor, and against purchasers and incumbrancers in good faith and for value, if the assignment is not recorded, and the inventory required by section 4667 is not filed. * * * " The statute evidently places as much importance to the filing of a proper inventory as it does to the recording of a proper deed of assignment, for it declares that the failure to do either makes the assignment void as to the parties named in the statute. Section 4674 further provides that "until the inventory and affidavit required by sections 4667 and 4668 have been made, * * * and the inventory filed, * * * an assignee for the benefit of creditors has no authority to dispose of the estate or convert it to the purposes of the trust." It might with some force be assumed that these sections in terms require that the affidavit annexed to the inventory should be made by the persons executing the assignment, and annexed to and filed with the inventory, and that a failure to do so renders the assignment void, and that, this requirement being mandatory, a strict per-

formance of it is a condition precedent to the taking effect and validity of the assignment. It appears, however, to us that the most natural and reasonable construction of this section is that, in as much as the oath taken and affidavit attached are not constituent parts of the inventory or of this list of property of the assignor, but are extraneous and distinct from them, and are merely the verification of them, they do not in any sense affect the essential qualities or character of the inventory, or make it any more correct or perfect than it is inherently without the affidavit. The statute requires—First, that a correct inventory shall be made by the assignor; and, second, that it shall be filed in the manner prescribed by section 4669. The inventory must contain the requisites of section 4667. The filing is governed by section 4669. Neither of these make any reference to the affidavit mentioned in section 4668. Whether this requirement is mandatory or not, and must be strictly performed in order to render the assignment valid, is equally questionable. This must be determined by the usual rules for determining such questions.

Sutherland, in his work on Statutory Construction, (section 447), says: "When a statute is affirmative, it does not necessarily imply that the mode or time mentioned in it are exclusive, and that the act provided for, if done at a different time or in a different manner, will not have effect. Such is the literal implication, it is true; but since the letter may be modified to give effect to the intention, namely, that the legislature intends what is reasonable, and especially that the act shall have effect; that its purpose shall not be thwarted by any trivial omission, or a departure from it in some formal, incidental, and comparatively unimportant particular." Judge Cooley, in his admirable work on Constitutional Limitations, (page 93), gives the following rule for determining whether statutes are mandatory or directory: "Those directions, which are not of the essence of the things to be done, but which are given with a view merely to the orderly and prompt conduct of the business, and by a failure to obey which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory; and if the act is performed, but not in the time or in the precise mode indicated, it may still be sufficient if that which is done accomplishes the substantial purpose of the statute."

In respect to the requirements of the assignment statutes relating to the inventory, it seems that the essential thing to be done, or the substance of the thing to be provided for," is the making and filing of a correct inventory of the assets of the assignor within twenty days after the execution of the deed of assignment. The creditors are concerned and interested in this alone. It is essential that it should be as correct as possible, and be filed within the time for the information of all concerned. Yet neither the oath nor affidavit of the assignor could make it more complete or correct, or be more conclusive evidence that it was correct, or add anything to it in any essential particular, or be of any benefit to any one. The verification might be a sanction or pledge binding on the conscience of the assignor as an evidence of his good faith in making the inventory. It is but a mere formality, so far as any practical effect or beneficial use is concerned, for the inventory could be shown to be incorrect or incomplete if it was so, as well with as without the affidavit. In the case before us the affidavit of Place alone shows an attempted compliance with the statute, and, as far as he is concerned, does comply with it; and we are led to the conclusion that the failure of the secretary to affix his affidavit to the inventory, his failure being a comparatively unimportant requirement, does not invalidate an otherwise valid assignment.

As to the inventory. It appears from the undisputed evidence that, after the assignment was made and filed, an inventory, verified as stated above, was filed in the register of deeds' office of Lake county. After this, Place took this inventory from the files and took it apart, and inserted five pages of additional matter, containing a list of other personal property belonging to the assignor company. It was then returned to the register of deeds without an additional verification. A close inspection of the record in the case discloses the fact that the assignor company had large dealings with the Bank of South Dakota previous to the assignment and at this time there were a large number of notes that had been left by the company in the hands of the bank for collection or otherwise, which had been paid, to be accounted for by the bank. In accounting for them there was some difference claimed by the company as errors in the calculations upon the amounts due on notes and the

amount collected, and it was holding the bank for this difference. When the first inventory was filed, the assignor made the following statement in relation to these notes: "Against the ten notes first above owing to the Bank of South Dakota there are a number of claimed errors or unexplained differences. The particulars we are unable to give, but the purported lists are hereto attached as schedule G, none of which are in the possession of the corporation, and no vouchers for the same." It was this schedule G that was put in the inventory after it was filed in the office of the register of deeds. Evidently it was intended to have been placed in it when it was first filed, as the above extract from the inventory clearly indicated. The inventory, so far as this case is concerned, must be presumed to have been verified as if this schedule was attached when it was filed. There is no fraud urged in reference to this particular transaction. If any inference can be drawn from it, it rather shows an honest effort to comply with the law. There was no endeavor to conceal or keep back property belonging to the assignor, or suppress information in relation to the property standing of the company.

It is unnecessary to review the alleged errors in relation to the exclusion of evidence relative to the value of the property taken, because for the error of the trial court in excluding from the jury the evidence tending to show fraud in making the assignment, and that it was made to hinder, delay, and defraud creditors, the cause must be reversed and remanded for a new trial; and it is so ordered.

KELLAM, P. J.—I concur in the decision of this case as to reversal. I am not, however, entirely satisfied that section 4668, Comp. Laws, requiring the assignor to make, attach to, and file with the inventory an affidavit, in verification of the same, should be regarded as directory only; and, if not,—if the affidavit is indispensable to make the inventory complete under the statute,—then I am not fully satisfied that the affidavit made by the president alone was sufficient, where the authority to make and execute the assignment had been expressly and specially conferred by resolution upon the two officers, president and secretary. As this particular question was not argued, I prefer to reserve my opinion.

CORSON, J.,—I concur in reversing the judgment of the court below on the ground that the court erred in not submitting the question of actual fraud in the assignment to the jury. On the other questions discussed I express no opinion.

On rehearing.

KELLAM, J.—This case is now before us upon rehearing. The original opinion is published in 1 S. D.—, and in 51 N. W. Rep. 706, where the facts are fully stated. Appellants asked and were allowed a rehearing for the further discussion of the following propositions: (1) The court erred in holding that the question of noncompliance with the statute in relation to foreign corporations could not be inquired into collaterally; (2) in holding that the La Belle Ranche Horse Importing Company (respondent's assignor) was a *de facto* corporation; (3) in holding that a sufficient affidavit was made to the inventory; (4) in holding the inventory to be in compliance with the provisions of the assignment laws of the state.

So far as they are pertinent to either of the questions thus presented, the facts are not in dispute. The assignor, the La Belle Ranche Horse Importing Company, was a foreign corporation, organized under the laws of the state of Minnesota, and it had never complied with the provisions of sections 3190-3192 of the Compiled Laws, by filing with the secretary of the territory of Dakota, or with the secretary of state of the state of South Dakota, a copy of its articles of incorporation, or by the appointment of an agent residing in the territory authorized to accept service of process. The contention of appellants was and is that, without compliance with these provisions, such foreign corporation was incapable of transacting business in this jurisdiction, and that every contract it attempted to make was void, and should be so declared upon a showing of such noncompliance. Neither side, of course, questions the inherent power of the state to exclude foreign corporations from transacting business within its limits, subject to the constitution and laws of the United States, as declared in such cases as *Bank v. Earle*, 13 Pet. 588; *Paul v. Virginia*, 8 Wall, 168; *Carroll v. East St. Louis*, 67 Ill. 568; *Doyle v. Insurance Co.*, 94 U. S. 535; *Thompson v. Waters*, 25 Mich. 214; *People*

v. Association, 92 N. Y. 311. The question here is not as to the existence of the power, but to what extent, if at all, the state has undertaken to exercise it, and what is the legal effect of what it has done. The constitutional provision which, it is also claimed makes void any attempt of this foreign corporation to transact business in this state under the conceded conditions of this case, is as follows: "No foreign corporation shall do any business in this state without having one or more known places of business, and an authorized agent or agents in the same, upon whom process may be served." Section 6, art. 17, Const. The admission of the respondent is that his assignor, a foreign corporation, had not filed its articles of incorporation with the secretary of the territory or of the state, nor filed an appointment of an agent with such secretary, or in the office of the register of deeds of the county in which its principal place of business is located. It will be at once observed that the constitutional provision does not require either of these things to be done. Its requirement is satisfied if such foreign corporation had in fact a known place of business, and an authorized agent, upon whom process might be served in this state. It was not required of respondent, as assignee, in order to validate the acts of his assignor, that he show that such assignor had met the prescribed conditions. That he had not done so, if material at all, was defensive, and must come from the other side. *Sewing Machine Co. v. Moore*, 2 Dak. 280; 8 N. W. Rep. 131; *Lumber Co. v. Keefe* (Dak.), 41 N. W. Rep. 743. The admission did not negative the conditions named in the constitution. It was not admitted by plaintiff, nor proved by defendants, that such corporation did not in fact have a known place of business and an authorized agent in this state, but only that it had not filed its articles of incorporation, nor filed any appointment of an agent; hence it does not appear but that respondent's assignor was fully qualified to transact business in this state, so far as the constitutional provision controls.

Section 3190, Comp. Laws, is: "No corporation created or organized under the laws of any other state or territory shall transact any business within this territory * * * until such corporation shall have filed in the office of the secretary of the territory a duly authenticated copy of its charter or articles of incorporation, and shall have complied with the provisions of this

article," etc. Section 3192 names the other provisions to be complied with, to wit, the appointment of a resident agent, authorized to accept service of process, and the recording of the same in the office of the secretary of the territory (now state), and of the register of deeds of the county wherein such agent resides. It is specifically admitted that this was not done. The defendants claimed below, and, as appellants they claim here, as already observed, that the consequence of such non-compliance was to render void and of no effect every attempted act or contract of such non-complying corporation. Upon the former examination and decision of this case, we were impressed with the great diversity of views expressed by different courts upon this question, under constitutional and statutory provisions like our own; but a closer study satisfies us, not only that the conclusions of the courts are irreconcilable with each other, but that no general controlling principal can be deduced from the judgments or the reasoning of the cases. In some instances, as in *Bank v. Page*, 6 Or. 431, it is argued that the evident legislative intent was to prevent disqualified foreign corporations from transacting business in that state, and that, as no specific penalty was prescribed as a punishment for a violation of such prohibitory law, the legislature must have understood and intended that the usual result would follow an attempt to make an unlawful and prohibited contract, to wit, that it would be void and unenforceable, as otherwise there would be no penalty, and the law would be simply an expression of legislative opinion, without means for its enforcement; while in such cases as *Woods v. Armstrong*, 54 Ala. 150, followed in *Dudley v. Collier* (Ala.), 6 South Rep. 304, the fact that a penalty is provided in the law is regarded as important, if not controlling, in establishing the severely prohibitory character of the law, and in making the contract void; while in still other cases, as *Lumber Co. v. Thomas* (W. Va.), 11 S. E. Rep. 37, the presence of a penalty in the law is taken to mean that the legislature intended no other forfeiture or disadvantage to result from non-compliance with the law, and the contract of the non-complying foreign corporation was held good. With these cases, and many others of which these are simply representative, before us, we conclude that a collation and attempted analysis of them would be profitless in developing from them any general principle or rule adopted by the courts in the construction

of statutes of this kind. The only proposition upon which all agree is the elementary one that the statute should be given such effect as the legislature intended. It certainly was not intended by it to adopt or announce a policy of excluding or even discouraging foreign corporations from transacting business in this territory or state, for it named very easy conditions upon which their right and qualification might be established and made unquestionable. The leading thought and primary design of the legislature undoubtedly was to protect the people of this state from imposition and loss at the hands of alien corporations, whose responsibility, character, powers, and home were unknown to them. They must file copies of their articles of incorporation, so that their powers and the character of the corporation might be known to those who might have occasion to deal with them, and they must publicly announce upon whom, as their agents, process might be served, if found necessary to bring suit, and thus bring themselves within the jurisdiction of the courts. Until the foreign corporation does this it has no legal right or standing to transact business in the state; but it does not follow that it was intended that every attempt to do so should be void without regard to its effect upon either party. The statute was designed to place foreign corporations, in respect to a knowledge of their powers, the object of their incorporation, and the jurisdiction of our courts within the state over them, in the same position as domestic corporations. In the case either of domestic or foreign corporations, the state names the conditions upon which it may transact business. It does it in its sovereign capacity, as the conservator of the rights and best interests of its citizens. The state, which alone can name the conditions, can alone enforce their observance. The statute in this case is directed, not against the contract made or the act done, but against the party acting. The wrong done in disregarding the law is against the state, and not against the individual. It may have been to the advantage of the individual. Transacting business in the state without compliance with the statutory conditions is a usurpation of power by the corporation, but with the state rests the right to elect whether it will acquiesce in such usurpation, or dispute and prevent it. This is the rule in respect to a domestic corporation, certainly where it is conceded there was legal authority for its creation. Ang. & A. Corp. §§ 94.

636; *Lehman v. Warner*, 61 Ala. 455; *Cochran v. Arnold*, 58 Pa. St. 399; *Baker v. Backus*, 32 Ill. 79; *Humphreys v. Mooney*, 5 Colo. 282; *North v. State*, 107 Ind. 356; 8 N. E. Rep. 159; *Doyle v. Petroleum Co.*, 44 Barb. 239. And if this is the rule in respect to domestic corporations, and the object and purpose of this law is as far as practicable to make the foreign corporation within the state as a domestic one, why should not the rule apply, leaving to the state and not to an individual litigant, who may not even be a resident of the state, the election of insisting upon an entire compliance with the law, or a waiver of such compliance? We think it should, and in this conclusion we are directly supported by the supreme court of North Dakota construing the same law, inherited from the territory by both states. *Mill Co. v. Bartlett*, (N. D.), 54 N. W. Rep. 544. See also, *Grant v. Coal Co.*, 80 Pa. St. 208.

In our former opinion, it was suggested that the state might proceed under sections 5345, 5346, Comp. Laws, providing that the remedies heretofore reached by writ of *quo warranto*, might be obtained by civil action, as provided in said sections. Against this suggestion, appellant contends that said sections were, by implication, repealed by the state constitution, and that in any event, they are inapplicable in the case of a foreign corporation. In our judgment, neither contention can be maintained. In *People v. Association*, 84 Cal. 114; 24 Pac. Rep. 277, cited by appellant in support of the theory of repeal, the facts were not as here. There the legislature had expressly abolished the writ of *quo warranto*, and proceedings by information in the nature of *quo warranto*, and by the same section, and in continuous language, provided that the remedies obtainable under the abolished writ and proceedings might thereafter be obtained by civil actions, in the manner thereafter provided. Section 802, Code Civ. Proc. 1872. But here the territorial legislature made no attempt to abolish either. Such attempt would have been abortive, if undertaken, for the powers and jurisdiction of the territorial courts were established by the organic act, and included the power and right to issue all common-law writs. The civil action provided by those sections was therefore not exclusive, but cumulative. In the California case, however, the legislature abolished the writ, and in the same breath provided a new remedy. The two provisions were

evidently intended to be interdependent, so that there might have been reason for holding that the new constitution, which restored the abolished writ, also had the effect of repealing the provision for a substitute; but in that case even the court did not go to that extent. It simply recognized the fact that such contention might be made, and, without passing upon the question, suggested the answer that, even if the claim of implied repeal were allowed, the power of the court was quite as broad under the writ of *quo warranto* as under the statute claimed to be repealed. Repeals by implication are not favored, and we see no reasonable ground for holding that the constitutional provision defining the jurisdiction of the courts created by it repealed the statutory section cited.

Appellant further contends that the civil action provided for by the statutory sections under consideration is not available against a foreign corporation, for the reason that the purpose of the action must be "vacating the charter or articles of incorporation, or for annulling the existence of a corporation, and that the courts of this state cannot vacate the charter, or annul the existence of a foreign corporation." If this reasoning is conclusive, what shall be done with the first of the two cited sections,—5345,—which declares that the remedies formerly attainable by *quo warranto* proceedings might thereafter be obtained by the civil action provided for by the subsequent sections. This would seem to be a plain declaration by the legislature of the intended scope of these sections and of the action authorized. The jurisdiction of our courts, prior to the enactment of these sections, to control foreign corporations within the state by *quo warranto* proceedings, can hardly be questioned; and it is expressly enacted that, if there were such remedy by *quo warranto*, it might now be obtained by civil action. True, the purpose of the action is to "annul the existence of the corporation," but that must be taken to mean its existence within this state. Whenever it attemptst illegally to come into this state, and live, and exercise the functions of a living corporation, it may be proceeded against in this civil action, and its existence within this state annulled. The Ohio statute is similar to ours, but it has not, like ours an authorative declaration of its intended scope, and it is held to apply to foreign and domestic corporations alike. *State v. Insurance Co.*, 47 Ohio St. 167; 24 N. E. Rep. 392. But, even if appellant were clearly right upon

both these minor questions, the merits of this controversy upon the major question of whether the validity of the executed acts of a foreign corporation may be investigated and settled in a collateral proceeding for that purpose, remains unaffected; for, with the statute authorizing a civil action repealed, *quo warranto* proceedings would still remain, and, as suggested in *People v. Association, supra*, are entirely adequate for the maintenance of the authority of the state against a usurping corporation, whether foreign or domestic. We might say in passing that the constitutional authority of the supreme and circuit courts to issue writs of *quo warranto*, and to hear and determine the same, must be understood to give such courts jurisdiction of cases in which the information in the nature of *quo warranto* has become a substitute for the ancient writ. *State v. Gardner* (S. D.), 54 N. W. Rep. 606.

The second proposition of appellant in the petition for rehearing is the error of the court in treating a foreign corporation under consideration as a *de facto* corporation. Appellant's amended answer, upon which this action was tried, alleges "that, at the time of its pretended assignment, the La Belle Ranch Horse Importing Company was a foreign corporation, incorporated under and by virtue of the laws of the state of Minnesota," and then avers its incapacity to make the assignment under consideration, or to do any other business in this state, because it had not complied with the requirements of the statute already noticed as to foreign corporations. The question, then, is this: Is a corporation, duly organized under the laws of another state, but doing business in this state, without having complied with the statutory conditions named, entitled to be considered and treated as a *de facto* corporation? If we have correctly decided the first proposition discussed, there can be little doubt as to this. We have already said that the acts of such a body were valid as corporate acts until such assumption of authority is challenged by the state. This is, at least, equivalent to saying that, during the time the state acquiesces in the transaction of business by such foreign corporation, it must be considered and held to be a *de facto* corporation. This case is radically different from *Empire Mills v. Alston Grocery Co.*, (Tex. App.), 15 S. W. Rep. 505. There it appeared and it was so stated in the opinion, that the grocery company had never or-

ganized at all. The court says: "An examination of the case before us discloses no organization at any time or place." They had no standing as a foreign corporation. Besides, in that case, which was upon demurrer, it was admitted that the purpose of the alleged incorporators was to commit a fraud upon the laws of Texas, where they attempted to do business, and upon Iowa, where they pretended to file their articles. No such facts appear here.

Appellant's third proposition is that the court erred in holding that a sufficient affidavit was made to the inventory. The two respects in which the affidavit in this case is assailed are (1), that it is not made by the assignor, (the corporation), but by its president, and does not verify its statements according to the best knowledge and belief of the assignor, (the corporation), but according to the best knowledge and belief of its president, who makes it; and (2) that, as the board of directors had authorized the president and secretary to execute the assignment, it was necessary that both make and sign the affidavit. We are satisfied neither point is good, for reasons stated at length in the former opinion, written by Judge Bennett. A corporation could, of course, make no affidavit except by an agent, and no agent could truthfully swear to the best knowledge and belief of any person or persons other than himself. Any attempt to do so would be uncandid and worthless on its face. The object of the statutory provision was to secure an inventory whose justness and truthfulness should be guaranteed by the oath and conscience of the assignor. In the case of a corporation, we think that its president, or its secretary, or any other managing agent, is presumably qualified to make the affidavit.

It is next urged that the court erred in holding the inventory to be in compliance with the provisions of the assignment laws of this state. In the petition for rehearing the appellant represents that but a part of the objections raised against the inventory was considered by the court, or at least discussed in the opinion, and urges upon our present notice that the inventory does not even purport to contain "a list of all the creditors of the assignor;" and it shows upon its face that it does not contain a list of all the creditors. It was not necessary that the inventory should advertise itself as containing all the creditors. It is not so much what

it purports to contain as what it does contain that is important. The statute does not require the inventory itself to state that it contains all the creditors. *Landauer v. Conklin* (S. D.), 54 N. W. Rep. 322. If we understand appellant's contention, it is that the schedule affirmatively shows that it does not contain all the creditors of the assignor, because it shows that certain of its lands are subject to mortgage liens, while the holders of such liens do not appear as creditors. But, assuming this to be correct, it does not follow that the holder of a claim against the lands is necessarily a creditor of the assignor. The company may have bought and held these lands, subject to the incumbrances referred to, without making itself a debtor to the holder of such incumbrances. It is only "creditors of the assignor" that are required to be listed by the provisions of the law under which their objection is made.

It is next suggested, as a defect in the inventory, that it "nowhere specifies the incumbrances on any particular piece of land, giving the name of the party holding the mortgage, his place of residence, the true consideration of the liability, or the place where it arose." Without discussing what would be a sufficient compliance as to particularity of detail with subdivision 7 of said section 4667, requiring the inventory to show all the assignor's property, "and the incumbrances existing thereon," we content ourselves by saying that it nowhere appears that the incumbrances referred to were upon separate or particular pieces of the lands described. All the incumbrances may have rested upon all the lands. To justify an examination of either of these objections upon the merits would require us to assume facts which are not proved. Appellant also objects to the inventory of the notes owned and assigned by the assignor, because at the end of this schedule appears the statement: "All the notes in this division No. 2 were listed by the ex-secretary and treasurer, George L. Wright, and are in his possession, together with all other papers and books belonging to the corporation." We apprehend it is unimportant who actually makes the list, provided, when made, the assignor adopts it, and verifies it, as required by the statute, which appears to have been done in this case. In construing an assignment for the benefit of creditors under our statute, the same rules apply as in cases of ordinary contracts and conveyances, and, if allowable, within its terms, such interpretation and construction should be given to an

assignment as will render it legal and operative, rather than that which will render it illegal and void. *Landauer v. Conklin*, *supra*; *Burrill, Assignm.* (5th Ed.), p. 480; *Townsed v. Stearns*, 32 N. Y. 209; *Bank v. Dunn*, 67 Ala. 381.

We have thus considered, at length, the several points upon which appellant asks to be reheard, and find nothing which leads us to believe we were in error in our former decision.

Upon the part of respondent, the claim is made upon this rehearing that, upon the execution and delivery of this assignment, the property covered by it passed into the custody of the law, and so beyond the reach of attachments, and this contention is based upon section 4675, Comp. Laws, providing as follows: "After the lapse of six months from the date of filing his bond, the assignee, on motion of one of the creditors, with ten days' notice, accompanied by an affidavit of the creditor, his agent or attorney, setting forth his claim and the amount thereof, and that no account has been filed within six months, may be ordered by the court, or by the judge thereof, at any place in his judicial district, to render an account of his proceedings within a given time, to be fixed by the court or the judge thereof, not to exceed fifteen days. All proceedings under this title shall be subject to the order and supervision of the judge of the district court of the county in which such assignment was made, and such judge may, from time to time, in his discretion, on the petition of one or more of his creditors, by order, citation, attachment, or otherwise, require any assignee or assignees to render accounts and file reports of his or their proceedings, and of the condition of such trust estate, and may order or decree distribution thereof; and such judge may, in his discretion, for cause shown, remove any assignee or assignees, and appoint another or others instead, who shall give such bonds as the judge, in view of the conditions and value of the estate, may direct; and such order or removal and appointment shall in terms transfer to such new assignee or assignees all the trust estate, real, personal, and mixed, and may be recorded in the deed records in the office of register of deeds of any county wherein any real estate affected by the assignment may be situated. And such judge may by order, which may be enforced as upon proceedings for contempt, compel the assignee or assignees so removed to deliver all property, money, choses in action, book ac-

counts, and vouchers to the assignee or assignees so appointed, and to make, execute and deliver to such new assignee or assignees such deeds, assignments, and transfers as such judge may deem proper, and to render a full account and report of all matters connected with such trust estate. Whenever any assignee so removed shall have fully accounted for and turned over to the assignee or assignees appointed by the judge all the trust estate, and made a full report of his doings, and complied with all orders of the judge touching such estate, and also whenever an assignee has fully complied with his trust, he may by order of the judge be fully discharged from all further duties, liabilities, and responsibilities connected with the trust. In either case he shall give notice by publication in some newspaper of the county, if there be one printed and published therein, if not in a newspaper published at the capital of the territory, once in each week, for at least three weeks, that he will apply to such judge for such discharge, at a time and place to be stated in such notice, which time shall not be more than three weeks after the last publication of the notice. If, upon the hearing, the judge shall be satisfied that the assignee is entitled to be discharged, he shall make an order accordingly; or, if in the opinion of the judge, anything remains to be done by such assignee, he may require the performance thereof before making such order. Such order shall have the effect of discharging the assignee and his sureties from all further responsibility in respect to the trust, and such order shall not be refused on account of any failure on the part of the assignee to comply with the formal provision of law, where no loss or damage to any one shall have occurred through such failure. Whenever the trust estate shall have been taken out of the hands of the assignee by proceedings in bankruptcy in the federal court, the assignee may in like manner be discharged, upon showing that he has fully accounted with the assignee in bankruptcy, and turned over to him the whole of the trust estate."

We do not think respondent's contention can be maintained. This assignment was made under the statute. The right to make it, is at the very outset, by section 4660, secured to the insolvent debtor who, in so doing, "acts in good faith," and such assignment, when made, is expressly declared in the same section to be "subject to the provisions of this Code relative to trusts and to fraudu-

lent transfers." It is only when the assignment is made "in good faith" that it is authorized by, or is under the protection of the statute; and then, to further secure the rights of creditors, and to open the doors to a searching investigation of the fides of every such transaction, it is expressly provided that when made, even though modally within the letter of the statute, it is still subject to statutory provisions relative to trusts and conveyances. With these authoritative and unambiguous declarations before us as to the intent and purview of this law authorizing and controlling assignments, we must rule against respondent's contention, unless we can find in said section 4675, and upon which he relies, a reasonably plain indication that the legislature intended to abrogate the fundamental rule of the first section of the law to which we have referred. This section—4675—is a combination of section 1, c. 8, and section 1, c. 9 of the Laws of 1887. Prior to these amendments, the statute (§ 2042, Civil Code) simply provided that the assignee might after six months, on complaint of a creditor, be required to account before the district court of the county where the inventory was filed, "in the manner prescribed by the Code of Civil Procedure." This action was probably taken from the California Civil Code, § 3469, which provided for an accounting "in the manner prescribed by the insolvent laws of this state." There were no insolvent laws in this territory; hence the necessity for this unintelligible reference to the "manner prescribed by the Code of Civil Procedure." The immediate purpose of these amending sections, now constituting section 4675, undoubtedly was to provide a simple and expeditious means by which the assignee might be required to report and account. That was the thought of the first section, and that at once suggested the necessity of providing for the removal of a dishonest or unfaithful assignee, and the substitution of another, and that, in turn, to the propriety of providing for the final discharge of the assignee when his accounting should be full and satisfactory. Incidental to the accomplishment of these ends, and in connection with these particular provisions, it is said that "all proceedings under this title shall be subject to the order and supervision of the judge of the district court of the county in which such assignment was made," and providing that such supervisory jurisdiction might be called into active exercise by petition

of one or more creditors. But we feel very sure that the legislature never intended by these subsidiary provisions to radically change the original theory of the statute authorizing and regulating assignments. When the statute expressly declares that every assignment made under it shall be "subject to the provisions of the Code relative to trusts and to fraudulent transfers," and then, as to "trusts and fraudulent transfers," that "every transfer of property or change therein made * * * with intent to delay or defraud any creditor or other person of his demands is void against all creditors of the debtor," little reason is left for debate as to whether an assignment executed for such fraudulent purpose is valid or void. If void, it conveys nothing to the assignee, but leaves the property in the assignor. An instrument would not be void if it had the effect to transfer the title or the custody of property from one to another. An assignment with preferences, being invalid, would have no effect, only that the statute affirmatively says that in such case the property of the insolvent shall become a trust fund, to be administered by the court, (section 4660); but no such status is declared for property covered by a fraudulent or defective assignment, but in such case the whole transaction is stamped as void. The statute of Iowa under which *Shoe Co. v. Mercer*, 51 N. W. Rep. 415, was decided, holding property covered by an assignment under that law to be in *custodia legis*, is different from ours in just the respect that would account for the holding in that case. By our law the assignor makes a list of his creditors, and files it with the assignment in the office of the register of deeds of the proper county, and no provision is made in the statute whereby a creditor may, under the assignment, contest the correctness or honesty of the list or the validity of any particular claim. By the Iowa law the list of creditors is made by the assignee, and not by the assignor, and filed in the court, and any creditor may except to the demand of any other creditor. The court tries the issue thus made, by a jury, if necessary, and renders judgment. Thus the statute itself provides a direct and adequate means by which any creditor may, without disturbing the assignment, object to and have judicially investigated the validity of the claim of any creditor. With such provisions in force there is no reason for allowing a general attack upon the assignment, particularly on account of a challenged claim not listed or necessarily approved by the assignor.

Under the Iowa law the list of creditors or its correctness sustains no such relation to the assignment as under ours. There no assignment can be declared void for want of such list. Here the statute makes the assignment void if the list is not duly made and filed. There are other respects in which the two statutes are essentially different. They are not constructed upon the same theory or plan. The reasoning and ruling of the Iowa case are not applicable to our statute.

It is argued by respondent that the Minnesota cases point to the conclusion contended for by him. He suggests what may be assumed as correct, that so much of said section 4675 as was section 1, c. 9, Laws 1887, providing "that all proceedings under this title shall be subject to the order and supervision of the judge of the district court of the county in which such assignment was made," etc., was taken from the Minnesota law of 1876, as amended in 1877, and then cites *Kingman v. Barton*, 24 Minn. 295, where the question was upon the rights of an assignee who had failed to file a bond as required by the statute. In his brief the respondent quotes from the opinion of the court the following language as indicating the opinion of the court as to the character of the law: "Further, the proceeding is in the nature of a judicial proceeding. By the filing of the assignment the court gets jurisdiction over the assignor, and probably over the property, but it gets none over the assignee until he files his bond." It must be remembered in this connection that the Minnesota law required the assignment, the inventories, and the bond of the assignee all to be filed in the office of the clerk of the district court, and, while it might be plausible to say that the object and effect of filing such papers in court was to place their subject-matter under the jurisdiction of the court in which they were filed, it would not be equally plausible to say that the filing of the same papers in the office of the register of deeds, as required by our statute, was intended to have the same effect. The later Minnesota cases, like *Donohue v. Ladd*, 31 Minn. 244; 17 N. W. Rep. 381, and *In re Mann*, 32 Minn. 60; 19 N. W. Rep. 347, in which it was held that the assigned property was in *custodia legis*, arose under the insolvent laws of 1881, and, as respondent frankly concedes, are not closely applicable to this case. Aside from the single provision in said section 4675, borrowed from the Minnesota

statute, we find nothing in our law that would suggest the thought or legislative intent that, upon the making of an assignment by an insolvent debtor, and filing the same in the office of the register of deeds, the circuit court should at once take and have jurisdiction and control over the execution of the trust any more than over any other trust which the statute allows parties to make. The borrowed section may be an apt and consistent provision in a law whose general purpose and theory is to place the assigned estate under the immediate supervision and control of the court, but its transplantation from such a law to ours, which was not so intended and has no such purpose, simply adds a new feature to our law, important, but still incidental. The amendment is attached to and becomes a part of the law, and not the law to the amendment. We are therefore of the opinion that the execution of the assignment did not place the property mentioned in it in the custody of the law, so as to protect it from the reach of appellant's attachments. We say the execution of the assignment did not do this. What may be the effect upon the status of the assigned estate of the actual interference by the court upon an affirmative showing of cause therefor, under said section 4675, it is not now necessary to consider, for no such question is presented by the facts in this case. We have thus, at unjustifiable length, perhaps, attempted to examine each point presented by either side upon this rehearing, and we discover no reason to doubt the correctness of the conclusion of the former opinion as prepared by Judge Bennett.*

FOREIGN CORPORATIONS.

1. The subject generally.—The subject of *foreign corporations* has been pretty generally covered by prior decisions and notes in this series as follows: *Demarest v. Flack*, 5 Am. R. R. & Corp. Rep. 264, and note; *Attorney General v. Fidelity & Casualty Co.* 6 Am. R. R. & Corp. Rep., 599, and note; *Washburn Mill Co. v. Bartlett*, 7 Am. R. R. & Corp. Rep. 394, and note; *People ex rel. Penn. R. Co. v. Wemple*, 7 Am. R. R. & Corp. Rep. 782.

2. Validity of contracts made before complying with state laws.—The statutes of Tennessee provide that any foreign corporation desiring to own property or carry on business in this state, of any kind or character, shall first file in the office of the secretary of state a copy of its charter, and cause an abstract of the same to be recorded in the register in each county in which

* Reported in 51 N. W. Rep. 706; and 55 N. W. Rep. 931.

such corporation desires or proposes to carry on its business or to acquire or own property, as required by section 2 of chapter 81 of the act of 1877: and that it shall be unlawful for any foreign corporation to do or attempt to do any business or to own or to acquire any property in this state without having first complied with the provisions of the act, under penalty of a fine of not less than \$100 nor more than \$500, at the discretion of the jury. In a case involving the validity of a contract made by a foreign corporation before complying with this statute, it was held that the contract was void and unenforceable. *Cary-Lombard Lumber Co. v. Thomas*, (Tenn.) 22 S. W. Rep. 743. The court says: "After this act went into effect, March 21, 1891, by its terms and provisions this foreign corporation was not authorized to do any business or to own any property in Tennessee until the provisions of the act were complied with. It could, therefore, own no property and make no legal contract in Shelby county, where this property was situate, until the abstract or memorandum was recorded in the register's office of that county, which, as before stated, was the 28th of July, 1891. All contracts made by it and all business transacted by it in Shelby county prior to that date were illegal, and no right of property or of action could exist in it prior to that date. It follows that such company can have no remedy growing out of any transaction before that date in Shelby county, and can recover upon no contract, express or implied, entered into before that date, and is not entitled to retake or recover any materials or lumber furnished prior to that date. *Stevenson v. Ewing*, 87 Tenn. 46; 9 S. W. Rep. 230; *Haworth v. Montgomery*, 91 Tenn. 16; 18 S. W. Rep. 399." On rehearing the court further said: "Upon petition to rehear it is earnestly pressed upon the court that it was not intended by the legislature that by declaring the doing of any business to be unlawful it should follow that any contract made in contravention of it should be void, that it was not intended to prohibit the business on the ground that it was immoral, or against public policy, or because it was desired to suppress the same, and submitting that the courts should enforce the contracts of foreign corporations who did not comply with the act, leaving the state to compel a compliance with the laws by enforcing the penalty for failure. This identical view of the question was passed upon by the court in *Stevenson v. Ewing*, 87 Tenn. 50; 9 S. W. Rep. 230, and it is there said: 'When a contract is prohibited by statute it is immaterial to inquire whether the statute was passed for revenue only or for any other object. It is enough that parliament has prohibited it, and it is therefore void.' By the very terms of the act of 1891 (chapter 122, § 3) it is made unlawful for any corporation to do or attempt to do any business or to own or acquire any property in the state without having first complied with the provisions of the statutes. Every transaction or contract, express or implied, made by a foreign corporation after the passage of this act of March 21, 1891, and before its charter was registered and memorandum recorded as the law provides, was illegal, and no rights or remedies can be predicated thereon in favor of the company. With the wisdom and policy of the law this court has nothing to do. It can only execute it as it is on the statute books, and cannot refuse to enforce it."

It was further held that the illegality of the transaction need not be set up in the pleadings in order to be available as a defense. "The courts will deny any

relief upon any illegal contract or transaction whenever the illegality is made to appear, whether in the pleadings or proof; and will repel the party guilty of the illegality from the court whenever the fact appears. In order to entitle the complainant to any relief it must show affirmatively that it had complied with the law. Until that is done, all its transactions are illegal. The burden of proof being upon it, the court can presume nothing in its favor, and can only hold such of its contracts enforceable as it shows were made after it had complied with the law enabling it to make a valid contract and to transact business."

In some cases the state statute expressly provides that a failure to comply with the statute shall not affect the validity of any contract by or with the corporation. In such case the corporation can enforce a contract though it has not complied with the statute. *Rogers & Co. v. Simmons*, 155 Mass. 259; 29 N. E. Rep. 580.

3. Authority of insurance commissioner to grant or refuse foreign company the right to do business—mandamus.—Where the statutes of a state confer upon an insurance commissioner an absolute discretion to grant or refuse a certificate to do business, to a foreign company, or to revoke such certificate, the courts have no power to control such discretion by *mandamus*. *State ex rel. Dakota Hail Ass. v. Carey*, 2 N. D. 36; 49 N. W. Rep. 164. "Whether such unrestricted power and discretion to either grant or withhold a permit to do business within the state, and to revoke or not revoke such permit when granted, is or is not wisely vested in the insurance commissioner, are questions which address themselves to the legislature. The courts cannot consider the expediency of any law which the legislature has power to enact. The power to prescribe terms on which a foreign insurance company can do business in a state is plenary."

4. Taxation—exemption of charitable and religious corporations does not apply to foreign corporations.—The laws of New York, 1890, c. 553, which extend the limit of property capable of being owned by charitable and religious corporations, and which exempt the personal property of such corporations from general taxation and from the collateral inheritance tax, is a grant of corporate powers and privileges applicable solely to domestic corporations, and a foreign charitable corporation cannot claim exemption from the collateral inheritance tax by virtue of this statute. *In re Prime's Estate*, 136 N. Y. 347; 32 N. E. Rep. 1091.

5. Persons claiming to act for a foreign corporation and complying with statute are estopped to deny incorporation.—The compiled laws of Utah, 1888, § 2293, provide that foreign corporations shall within sixty days after commencing business in the territory file with the secretary of the territory a certified copy of their articles of incorporation, and shall designate some person residing in the county where their principal place of business is situated, upon whom process may be served, and shall file the same with the secretary, and a copy of such designation, duly certified by him, shall be evidence of the appointment. Held, that individuals who hold themselves out as a corporation by complying with the requirements of said section will not be permitted to deny their corporate existence when sued by persons who have acted in good faith upon such representations, and that the certificate of the

secretary of the territory is sufficient proof of the appointment of the agent on whom to serve process. *Liter v. Ozokerite Min. Co.* 7 Utah, 487; 27 Pac. Rep. 690.

SPELLMAN v. LINCOLN RAPID TRANSIT CO.

(Supreme Court of Nebraska, May 8, 1898.)

1. **STREET RAILROADS. DUTIES AND LIABILITIES GENERALLY AS CARRIERS OF PASSENGERS.** Street-railway companies are common carriers of passengers, and are liable as other common carriers upon common-law principles.

2. Common carriers, for the protection of their passengers, are bound to the exercise of more than ordinary care; they are bound to exercise extraordinary care and the utmost skill, diligence, and human foresight, and are liable for the slightest negligence.

3. **INJURY TO PASSENGER FROM DERAILMENT. PRESUMPTION OF NEGLIGENCE.** Where a street-railway car is derailed, and a passenger injured thereby, the presumption is that the casualty was due to the negligence of the carrier, and the burden is on it to rebut that presumption.

4. **WHAT SUFFICIENT TO OVERCOME PRESUMPTION OF NEGLIGENCE FROM DERAILMENT.** Where a passenger, without negligence on his part, is injured by the derailment of the car in which he is traveling, the carrier, to overcome the presumption of negligence caused by such derailment, must show that the accident was produced by causes wholly beyond its control, and that it had not been guilty of the slightest negligence contributing thereto, and that, by the exercise of the utmost human care, diligence, and foresight, the casualty could not have been prevented.

Charles A. Burke and Stearns & Strode, for plaintiff in error.
Webster, Rose & Fisherdick, for defendant in error.

RAGAN, C. Thomas Spellman brought suit in the district court of Lancaster county, Neb., against the Lincoln Rapid Transit Company, alleging that it was a corporation owning and operating a street railroad in the city of Lincoln, and that on the 23d of May, 1890, while he, Spellman, was a passenger upon one of the transit company's cars, the defendant, its agents and servants so negligently and carelessly used, managed and controlled the said car and engine by which it was drawn, and so negligently and carelessly managed, used, looked after and repaired said road, and the tracks and switches connected therewith, that the car in which the plaintiff was carried and the engine drawing the same were allowed to run off the track; that, in consequence of the car running off the track, plaintiff was thrown with great force and violence against

the seat, and the railing thereof in front of him, and then back on the seat and edges thereof behind him, and was thereby permanently injured, and that the plaintiff was careful, and did not contribute to the injury in any degree whatever; and prayed for damages against the transit company. The answer of the defendant denied all negligence of itself or servants; admitted that the car was derailed, as claimed by the plaintiff; denied that the plaintiff's injuries were permanent; and alleged that the plaintiff was suffering from a rupture of old and long standing. To this there was a reply, consisting of a general denial, by the plaintiff. There was a trial to a jury, and a verdict for the transit company, and Spellman brings the case here on error. On the trial it was admitted that the transit company was a corporation, and engaged in the carrying of passengers for hire. There was no pleading or proof that Spellman was guilty of any contributory negligence whatever. The motive power of the cars was a dummy steam engine. The evidence in the record does not afford any precise explanation for the cause of the car's leaving the track. The trial judge, at the request of the transit company, gave the jury the following instruction: "While it is the duty of the defendant, as a carrier of passengers, to exercise proper care for their safety, yet the defendant is not an insurer of the safety of its passengers, and not liable to them for injuries resulting from such defects in its means of transportation as could not have been guarded against by the exercise of care on its part, and which are not due in any way to negligence on its part." "The test of negligence in such cases is whether the defect ought to have been observed practically, and by the use of ordinary and reasonable care." The giving of this instruction is here assigned for error. It will be observed that the test submitted by the learned judge to the jury was whether the transit company used ordinary and reasonable care. The defendant in error was a common carrier of passengers for hire, and the question to be determined in passing upon the correctness of this instruction is, what degree of care is due from a common carrier of passengers to its passengers? In Rorer on Railroads, (volume 2, p. 1434). it is said: "For injuries occasioned by negligence, street railways are liable, as others are, upon common-law principles, and no more so." And on page 1436, the same authority says: "The com-

pany is bound to the highest degree of care and utmost diligence to prevent their (passengers) injury." To the same effect, see *Shear. & R. Neg.* § 226. In *Smith v. Railway Co.*, 32 Minn. 1; N. W. Rep. 827, the court say: "Street-railway companies, as carriers of passengers for hire, are bound to exercise the highest degree of care and diligence consistent with the nature of their undertaking, and are responsible for the slightest negligence." In *Sales v. Stage Co.*, 4 Iowa, 546, the rule is thus laid down: "Carriers of passengers for hire are bound to exercise the utmost skill and prudence in conveying their passengers, and are responsible for the slightest negligence or want of skill in either themselves or their servants." See also, *Bonce v. Railway Co.*, (Iowa), 5 N. W. Rep. 177. In *Derwott v. Loomer*, 21 Conn. 245, the supreme court of that state laid down the rule thus: "In the case of common carriers of passengers, the highest degree of care which a reasonable man would use is required by law." This is also the doctrine of the supreme court of California. See *Wheaton v. Railroad Co.*, 36 Cal. 590, where it is said: "Passenger carriers by their contract bind themselves to carry safely those whom they take into their coaches or cars, as far as human foresight will go; that is for the utmost care and diligence of very cautious persons." This is also the rule in New York. See *Maverick v. Railroad Co.*, 36 N. Y. 378; where it is said "passenger carriers bind themselves to carry safely those whom they take into their coaches to the utmost care and diligence of very cautious persons." See, also, *Carroll v. Railroad Co.*, 58 N. Y. 126. This is also the doctrine of the supreme court of Colorado. See *Railway Co. v. Woodward*, 4 Colo. 1. This is the doctrine of the supreme court of the United States. In *Railroad Co. v. Derby*, 14 How. 485, it is said: "When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence." This doctrine is reaffirmed by the same court in *The New World v. King*, 16 How. 469. See these cases cited and approved in *Railroad Co. v. Hurst*, 93 U. S. 291, where the court say, in reviewing the cases cited above: "We desire to reaffirm the doctrine, not only as resting on public policy, but on sound principles of law." They also cite *Railroad Co. v. Lockwood*, 17 Wall. 357, and quote and affirm that case as saying:

“ The highest degree of carefulness and diligence is expressly exacted.” Continuing, the court say : “ The standard of duty should be according to the consequences that may ensue from carelessness. The rule of law has its foundation deep in public policy. It is approved by experience and sanctioned by the plainest principles of reason and justice. It is of great importance that courts of justice should not relax it. The terms in question do not mean all the care and diligence the human mind can conceive of, nor such as will render the transportation free from any possible peril, nor such as would drive the carrier from his business ; but it does emphatically require everything necessary to the security of the passenger, and reasonably consistent with the business of the carrier and the means of conveyance employed.” The rule as gathered from the foregoing authorities requires that a common carrier of passengers shall exercise more than an ordinary care, it requires the exercise of extraordinary care ; the exercise of the utmost skill, diligence and human foresight. It makes the carrier liable for the slightest negligence. It follows from the foregoing that the giving of the instruction complained of was error.

Spellman also assigns as error the giving by the court below, at the request of the transit company, instructions Nos. 2 and 3. They are as follows : “ (2) If the jury find from the evidence that the defendant constructed and laid its track in a proper manner, and had the same made safe and in good condition at the place of the accident complained of, before it was put into use, and from time to time since, at reasonably short intervals, had the same inspected and repaired by competent track men, especially employed for that purpose, and that the car upon which the plaintiff was riding at the time of the accident was derailed without any fault or neglect of the person or persons in charge thereof for defendant, and the same is not shown to have been caused by any defect in said road or car, then the plaintiff could not recover for any injuries caused thereby, and the jury should find for the defendant. (3) Unless the jury find that the cause of the accident was some definite and proven defect of defendant’s road, engines, or cars, or negligence on the part of defendant’s employes in operating the same, and could have been avoided by the exercise of proper care in inspection and repair and operation, then the jury will find for the defendant. The mere fact that the defendant’s car left the

track, and that the plaintiff thereby sustained injury, is not sufficient to sustain a verdict for the plaintiff. To find a verdict for the plaintiff, the jury must find that the defendant was in some way negligent in the care of its track or the running of its train, and the accident was caused by such negligence." We shall consider these two instructions together. The court, in effect, told the jury by these instructions that, though Spellman might have been injured by the derailling of the car, that fact did not raise a presumption of negligence against the transit company; and, further, it put the burden on Spellman of proving the particular cause of the derailment of the car. In 2 Rorer, R. R. p. 1434, it is said: "In actions against * * * (street railways) for personal injuries caused by the cars leaving the track, the burden of proof is on the company to show that there was no fault or want of care on its part." See the same doctrine in Patt. Ry. Acc. Law, § 439. The supreme court of the United States in Stokes v. Saltonstall, 13 Pet. 181, decided: "In an action against the owner of a stage coach used for carrying passengers, for an injury sustained by one of the passengers by the upsetting of the coach, the owner is not liable, unless the injury of which the plaintiff complains was occasioned by the want of proper skill or care in the driver of the carriage. * * * The fact that the carriage was upset * * * is *prima facie* evidence that there was carelessness or negligence or want of skill on the part of the driver, and casts upon the defendant the burden of proving that the injury was not occasioned by the drivers fault." This case was affirmed by the same court in Railroad Co. v. Pollard, 22 Wall. 341. In Railroad Co. v. Walrath, 38 Ohio St. 461, the supreme court thus announces the rule: "On proof of injury sustained by a passenger on a railroad train by the falling of a berth in a sleeping car, and that the passenger was without fault, a presumption arises, in the absence of other proof, that the railroad company is liable;" citing and affirming Railroad Co. v. Mowery, 36 Ohio St. 418. The supreme court of Colorado, in Railway Co. v. Woodward, 4 Colo. 1, adopted the rule in this language: "If a passenger is killed in consequence of the overturning of a car, a presumption arises that the casualty was the result of negligence, but such presumption may be rebutted." The supreme court of Minnesota, in Smith v. Railway Co., 32 Minn. 1; 18 N. W. Rep. 827, formulates the rule as fol-

lows: "Where an injury occurs to a passenger through a defect in the construction or working or management of the vehicle, or anything pertaining to the service which the carrier ought to control, a presumption of negligence arises from the happening of the accident, and upon such proof the burden will devolve upon the defendant to exonerate himself by showing the existence of causes beyond his control, unless evidence thereof appears as part of the plaintiff's own case." In the course of the opinion the learned judge who delivered it said: "The severe rule which enjoins upon the carrier such extraordinary care and diligence is intended, for reasons of public policy, to secure the safe carriage of passengers, in so far as human skill and foresight can affect such result."

From the application of this strict rule to carriers, it naturally follows that where an injury occurs to a passenger through a defect in the construction or working or management of the vehicle, or anything pertaining to the service which the carrier ought to control, a presumption of negligence arises. The rule is therefore frequently stated, in general terms, that negligence on the part of the carrier may be presumed from the mere happening of the accident. The reason of the rule seems to be that from the very nature of things the means of proving the specific facts are more in the power of the carrier. The latter, owning the property and controlling the agencies, is presumed to have peculiarly within his own knowledge the cause of the accident, which he might be interested to withhold, and might himself be unable to prove." Such is the doctrine of the supreme court of Illinois, as expressed by that court in *Railroad Co. v. Reynolds*, 88 Ill. 418, where it is said: "Where a railway car is thrown from the track, whereby a passenger for hire is injured, the presumption is that the accident resulted either from the fact that the track was out of order, or the train badly managed, or both combined, and the burden is on the company to show it was not negligent in any respect." This is also the rule in Indiana. See *Railroad Co. v. Williams*, 74 Ind. 462. It is also the rule in New York. See *Seybolt v. Railroad Co.*, 96 N. Y. 562. In *Feital v. Railroad Co.*, 109 Mass. 398, the action was against a street-railway company for injuries resulting to plaintiff from an accident that happened while she was traveling on one of the defendant's cars. The plaintiff, to prove her case against the

street-car company, called the conductor and the driver of the car as witnesses, and they testified that the car ran off the track, one wheel inside and one outside the track; that they with others left the car in question; that there was no defect in the car, the wheels, or the track; that the car was going about five miles an hour; that when they lifted the fore wheels on the track everything was right, and the car went on; that the cars went over this place just before and just afterwards without trouble, and they did not know what made the car run off. At the close of the plaintiff's case, defendant requested a ruling that the plaintiff could not recover, because she had failed to show negligence on the part of the street-railway company. This motion was overruled. The railway company then introduced evidence that the road where the accident occurred had been gone over by their superintendent the day before the accident, and that there was no defect in it; that the day after the accident he saw the place where it occurred, and that there was nothing the matter with the road then, and had not been since. The railway company then requested the court to instruct the jury as follows: "The plaintiff received her accident from the fact of the car's running off the track while traveling at a moderate rate. There is no evidence that the car was out of order. It is not claimed that the driver did anything wrong, or that the rails were before or then or afterwards out of order. * * * Under these circumstances, the plaintiff cannot recover. That there was no evidence of any negligence on the part of the railroad company; that the burden of proof is upon the plaintiff to show how the accident happened, and what was the particular negligence that caused the same; and that, unless the plaintiffs had done so, they could not recover." The trial court refused to so instruct, and this refusal was assigned as error. On appeal to the supreme court, it said: "On the trial of an action against a street-railway corporation for injuring a passenger, proof that the injury was caused by the car's running off the track at a place where the track and the car were under the exclusive control of the defendants is sufficient to charge them with negligence, in the absence of any evidence that the accident happened without their fault." In the light of the foregoing authorities, the court erred in giving the instructions complained of.

In our review of this case we have not been unmindful of the

suggestion of the counsel for defendant in error that the trial court cured instruction No. 3 complained of by instructing the jury, of his own motion: "A train of cars similar to that operated by the defendant is presumed to stay upon the track, and if such train should, for any reason, leave the track, the presumption is that it left the track through some fault of the defendants." It is not necessary to determine now whether this instruction conflicted with the ones complained of, nor whether one cured the other. The greatest difficulty with the instruction complained of lies in this: "Unless the jury find that the cause of the accident was some definite and proven defect of defendant's road, engine, or cars, or negligence on the part of the defendant's employes in operating the same and could have been avoided by the exercise of proper care in inspection, repairing, and operation, then the jury will find for the defendant." Here the jury were told, in effect, that the burden was on the plaintiff below to prove the cause of the derailment. This is not the rule. There is no claim by any one, nor is there a word of evidence, that Spellman was guilty of any negligence whatever. The transit company was a common carrier of passengers. Spellman was a passenger on its train. The car on which he was riding was derailed. He alleged he was injured thereby, and there was evidence to support the allegation. He alleged that the derailment of the car was through the carrier's negligence. The law by presumption supplied that proof for him. This was enough. The burden was then on the carrier to rebut this presumption of negligence by showing that it was produced by causes wholly beyond its control, and that it had not been guilty of the slightest negligence contributing thereto, and that, by the exercise of the utmost human care, diligence and foresight, the casualty could not have been prevented. The judgment of the district court is reversed, and the cause remanded, with instructions to the court below to grant the plaintiff in error a new trial. The other commissioners concur.*

Railroad accidents—when negligence presumed from the fact of the accident.—See generally: *Arkansas Midland R. R. Co. v. Canman*, 2 Am. R. R. & Corp. Rep. 811, and note; *Southern Kansas R. Co. v. Walsh*, 4 Am. R. R. & Corp. Rep. 231, and note; *Gleeson v. Virginia Midland R. Co.*, 4 Am. R. R. & Corp. Rep. 398, and note. Where the plaintiff, a passenger in a

* Reported in 55 N. W. Rep. 270.

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street car, was injured by a collision between the car and a vehicle on the track, the following instruction was held to be error: "It is the law that when a passenger, being carried on a train, is injured without fault of his own, there is a legal presumption of negligence, casting upon the carrier the burden of disproving it." *Hawkins v. Front Street Cable R. Co.*, 3 Wash. 592; 28 Pac. Rep. 1021. But see the *Gleeson* case above cited.

LEGENDRE ET AL., v. NEW ORLEANS BREWING ASSOCIATION.

(Supreme Court of Louisiana, April 24, 1898.)

1. CORPORATIONS, RIGHT OF STOCKHOLDER TO INSPECT BOOKS. A stockholder has the legal right to inspect the books of the corporation of which he is a member.

2. REMEDY FOR DENIAL OF RIGHT. SUIT FOR DAMAGES AGAINST CORPORATION. The error of the secretary in refusing to permit him to inspect the books is not of itself ground for damages against the corporation.

3. The company was not placed in default, and the act is not fixed upon the company as an act for which it is responsible.

E. W. Huntington and *Horace L. Dufour*, for appellants. *Charles F. Buck*, for appellee.

BREAUX, J.—This is an action sounding in damages to the amount of \$13,500 and interest. Suit was filed on 7th March, 1892. The plaintiffs, as owners of 838 shares of the capital stock of the defendant association, on the 8th day of May, 1891, and thereafter, applied to the secretary of the association to examine its books in which were recorded the transfer of stock. About that date the said stock could have been sold for \$131 per share, and subsequently it depreciated to \$115.50, per share. The plaintiffs allege that they have, by reason of the depreciation, sustained damages to the amount above stated, which they would have averted if the permission to examine the books of records of transfers of stock had been granted; that under article 245 of the constitution and other laws they had the right to inspect defendant's books; that the refusal to allow the examination obliges the defendant to repair the damages. The defendant interposed the peremptory exception of no cause of action; also the plea of vagueness. The plaintiffs presented a supplemental petition, which was filed on the 18th day of April, 1892, reiterating the allegations of their original petition, and claiming that they had

been damaged, since the filing of the suit, in the further sum of \$10,000, making the aggregate of \$23,500 claimed as damages. A second supplemental petition was subsequently filed, in which it was alleged that the books they applied for permission to inspect were, in addition to the book alleged in their original petition, defendant's stock ledger, and the bills payable, cash and ledger book and journal. Further that on the 8th day of May, 1891. these books showed that large sales of the stock of the company had been recently made; that the company had borrowed money to pay dividends; that its affairs were not properly conducted by the directors; that these books were the only source from which they could obtain information of the facts alleged; that, had they been allowed to inspect these books, these facts would have come to their knowledge. They would have foreseen the inevitable depreciation of their stock, and prevented the loss by selling their certificates of shares. They reiterate their demand for the difference in the value of the stock. The district court maintained the exception of "no cause of action," and rejected appellants' demand at their costs.

The plaintiffs invoke the rule that stockholders of a corporation have a right to examine its books at any reasonable time. The following authorities sustain the rule: Const. 1879, art. 245; *Martin v. Oil Works Co.*, 28 La. Ann. 204; *Cockburn v. Bank*, 13 La. Ann. 289. The rule is conceded by the defendant. The constitutional right to inspect the books at a reasonable time cannot reasonably be denied. There can be no question that the ownership of stock confers the authority to see that the property is well managed. The exercise of this authority involves primarily the right to examine the books. A denial of the right by the company in a proper case exposes the corporation to an action either of *mandamus*, whereby the custodian of the books is ordered by the court to permit the desired access to them, or in an action of damages against the corporate officers who prevented the examination. The responsibility of the corporation for the acts of the agent, and the right of a stockholder to sue in a proper case, are not denied in argument.

The question presented is whether, upon the demand which was made upon the secretary for permission to examine certain books and his refusal, plaintiffs can maintain an action for damages

against the defendant company. It may be incidentally stated that *mandamus* is a remedy preferable to a suit for damages. Cook, Stock, Stockh. & Corp. Law, c. 30. The right to inspect the books is not so absolute that *mandamus* will issue without regard to facts and circumstances. The reasonableness of the request should be considered. Though the right to inspect is the rule, and it is very seldom proper for the officers of the company to refuse to allow the examination, the refusal is justifiable when curiosity is the motive, or when the object is manifestly in opposition to the interest of the company. If *mandamus* had issued immediately after the refusal, the action would have been maintainable against the company only. It would have had the right to repudiate the refusal and permit the inspection. The act of the secretary is not absolutely binding upon the company in matter of the inspection of the books. He cannot stand in judgment, nor can he, as agent of the stockholders, occasion damages, for refusing the books, for which the company will be liable to one stockholder to the loss of the others, who are not parties, and have not given the least sanction to the refusal. Although the following quotation is not directly in point, it has certain bearing upon the subject: "Stockholders cannot sue the corporation for the purpose of remedying the wrongs committed by its officers without first applying to the directors to interfere and put a stop to the wrongs, and a refusal of the directors to do so." Beach, Priv. Corp. § 885.

An error of an officer in a subordinate position in refusing to permit books to be examined is not *per se* such an error as will expose the company to the payment of damages. The secretary may be the custodian of certain books, of which he has not, however, the absolute control. They are the company's books. Persons who become officers of a corporation place themselves in the situation of trustees and the relation of trustees and *cestuis que trustent* is created between them and the stockholders. 2 Wait, Act. & Def. p. 341. A corporation is not responsible for the unauthorized and unlawful acts of its officers, though done *colore officii*. "To fix the liability it must either appear that the officers were expressly authorized to do the act, or that it was done *bona fide*, in pursuance of a general authority, in relation to the subject of it, or that the act was adopted or ratified by the corporation." Ang. & A. Corp. p. 318. It has been de-

cided that a member of a corporation has the same right as any other creditor to secure the payment of his demand. An action was maintained against a corporation on a bond securing a certain sum to the plaintiff, a member of the corporation, the member being deemed by the court a plaintiff for the purpose of the suit; so of notes and book accounts and right to dividends. *Ang. & A. Corp.* p. 405. But we have not found a decision or a principle laid down in any of the text-books suggesting the possibility of a stockholder holding his co-stockholders responsible in damages on account of the refusal of an officer to allow certain books to be inspected. It is stated that the individual members are distinct from the artificial body endowed with corporate powers. This, of itself, does not demonstrate that it was ever contemplated that a secretary of a corporation might place a stockholder in the advantageous position, for a certain time, of having his account credited with an amount as damages, because from a date of refusal to allow inspection the stock had depreciated in value. The defendant company was not placed in default by an informal request made of the secretary.

The plaintiffs do not allege that they offered their stock for sale. They limit their complaint to the averments that the facts which they would have ascertained by an inspection of the books would have enabled them to foresee the inevitable "depreciation of their stock, and prevented their present loss by selling the same." This is not actual, but remote, and does not offer good ground to hold part of the stockholders in damages. The bad management of the directors, charged in the petition, which plaintiffs state they have discovered, is not a cause of action which they can maintain alone, and for their sole benefit; nor do they set it forth as a ground to recover. They limit their action to the refusal of the secretary. Though they allege mismanagement on the part of the board of directors, they do not allege that the secretary had for object in refusing the books the screening of any of the directors in any mismanagement. In reference to any loss by reason of any negligence of the directors or other officers it has been decided "that the injury is practically and ultimately an injury to the stockholders; but in the eye of the law the injury is to the corporation itself." "It is for the corporation to call the directors to an account for their negligence." The action "is not an action which

the stockholder is to bring. The negligence affects him not directly, but indirectly. * * * It is clear, also, that the stockholder cannot hold the corporation itself liable for the negligence of its directors. To allow such an action would be to make part of the stockholders liable to other stockholders for the loss, when all are equally injured, equally innocent, and equally in position to complain." Cook, Stock, Stockh. & Corp. Law, p. 702. The action cannot be maintained by one of the stockholders against the directors for his account and benefit; *a fortiori*, an action cannot be maintained by him against the company on the ground that the secretary did not surrender the books for inspection, whereby he would have ascertained that the affairs were not properly conducted by the directors. The exception of no cause of action was properly maintained. It is therefore ordered, adjudged, and decreed that the judgment appealed from be, and the same is hereby, affirmed, at appellant's costs.*

RIGHT OF MEMBER OR STOCKHOLDER TO INSPECT THE BOOKS AND RECORDS OF THE CORPORATION.

1. Right of stockholder at common law to inspect the corporate books and records—authorities holding right to be absolute.—It has many times been affirmed, in effect, that a stockholder has an absolute right to inspect the books and records of the corporation at any proper time. Thus Cooke in his recent work on Stock and Stockholders says: "The stockholders of a corporation had, at common law, a right to examine at any reasonable time any one or all of the books and records of the corporation. This rule grew out of an analogous rule applicable to public corporations and to ordinary co-partnerships the books of which, by well established law, are always open to the inspection of members." § 511. Redfield says: "It seems to be conceded as a well settled rule of law, that the shareholders or corporators in a joint stock corporation are entitled, as a matter of right, to inspect and take minutes from the books of the company at all reasonable times, as they are the best evidence of the facts there registered, and equally the property of all the proprietors." 1 Redf. Rys. p. 213.

Field in his work on Corporations, § 118, says: "It will be evident from the relation which the stockholder sustains to the corporate body, that he should have the right of access to, and examination of, the books and records of the corporation, and be restricted in this respect only by the charter, or such reasonable rules and by-laws in reference thereto, as are adopted in conformity with the fundamental law of its institution, and public policy. If he is not restricted by these, a stockholder should have the right to inspect the books at reasonable and proper times; and if this right is denied, he would be entitled to the compulsory process of *mandamus* to allow him so to do. And if he is re-

* Reported in 12 So. Rep. 837.

fused such right he could maintain an action for damages sustained by reason thereof."

Morawetz, although holding a different view of what the law is or ought to be, feels obliged to say that "in the United States the prevailing doctrine appears to be that the individual shareholders in a corporation have the same right as the members of an ordinary partnership to examine their company's books, although they have no power to interfere with the company's management." 1 Mor. Corp. § 473. Similar views are expressed by other text writers. Angell & A. Corp. § 381; 1 Beach Priv. Corp. § 75; 2 Spelling Corp. § 655.

It is not always easy, in considering all that a writer has to say on the subject of the examination of the books by stockholders, to determine what his personal views are. All agree that the right cannot be enforced by *mandamus*, except for some definite and proper purpose. In this connection they give expression to views to the effect that the right exists only where there is such a purpose to be subserved. On the whole it would seem that Morawetz, Beach and Spelling favor the view that the stockholder's right is not absolute but dependent upon the existence of a proper purpose. 1 Mor. Corp. § 473; 1 Beach Priv. Corp. § 76; 2 Spell. Corp. § 657.

Similar expressions of opinion on the part of judges may be culled from the decisions but they were seldom necessary to the decision of the case, and amount to nothing more than the personal views of the judge giving the opinion. Thus in *Lewis v. Brainard*, 53 Vt. 519, which was an action founded upon a statute and not upon the common law, it is said: "The shareholders in a corporation hold the franchise, and are the owners of the corporate property; and as such owners they have the right, at common law, to examine and inspect all the books and records of the corporation, at all reasonable times; and to be, thereby, informed of the condition of the corporation and its property." See also *Lewis v. Brainard*, 53 Vt. 510; *Deaderick v. Wilson*, 8 Baxter, 108, 137; *Cockburn v. Union Bank*, 13 La. Ann. 289; *State ex rel. v. Bienville Oil Works Co.* 28 La. Ann. 204; *Rauger v. Champion Cotton-Press Co.* 51 Fed. Rep. 61; *In re Birmingham Banking Co.* 36 L. J. Eq. 150.

The only decisions which support the stockholders right, in the broad and general way laid down in the foregoing citations, are to be found in the Louisanna cases just cited. *Cockburn v. Union Bank*, 13 La. Ann. 289 was a petition for a *mandamus* to compel the defendants to permit the petitioner to examine the discount book of the defendant bank. As to the object of the examination it was merely alleged that it was material to the interests of the petitioner and other stockholders, that the petitioner was desirous of ascertaining to whom and how loans and discounts were made and on what security and whether in accordance with law or otherwise. Upon exceptions in the nature of a demurrer to the petition it was held sufficient. "It cannot be denied," says the court, "that it is the right of everyone to see that his property is well managed and to have access to the proper sources of knowledge in this respect." In *State v. Bienville Oil Works Co.* 28 La. Ann. 204, which was also a proceeding for a *mandamus*, the petition alleged, as to the purpose of the examination, that the petitioner desired to see if the affairs of the company were properly managed, and proper books kept, to ascertain its assets and liabilities and to verify its stock and property with a view to such action

as his rights and interests might require. It was held the petitioner was entitled to the writ. Speaking of the rights of a stockholder in this regard the court says: "He has in the very nature of things, and upon principles of equity, good faith and fair dealing, the right to know how the affairs of the company are conducted, whether the capital of which he has contributed so large a share is being prudently and profitably employed or otherwise."

It is manifest that the general allegation of purpose in the foregoing petitions amounted to nothing more than what the law would imply from the fact of the ownership of stock. The cases, therefore, virtually hold that a stockholder has an absolute right to examine the books and papers of the corporation, and that to entitle him to a *mandamus* he need only show that he has demanded an examination at a proper time and place and that such examination has been refused.

The same view is also to some extent supported by *Huyler v. Cragin Cattle Co.* 40 N. J. Eq. 392. A statute of New Jersey provided that the chancellor, or supreme court, or any justice thereof might, on proper cause shown, order any or all of the books of a corporation to be brought within the state for examination. In an application under this statute, the petition showed irregularities on the part of the officers prejudicial to the petitioners, but no particular reason for an examination was shown beyond that of ascertaining the facts as to the condition of the company. An order was granted and the chancellor said:

"Stockholders are entitled to inspect the books of the company for proper purposes at proper times. *Field on Corp.* § 118; *Cockburn v. Union Bank*, 13 La. Ann. 289; *Ang. & Ames on Corp.* § 681; *People v. Throop*, 12 Wend. 183; *Rosenfield v. Einstein*, 46 N. J. L. 479. And they are entitled to such inspection, though their only object is to ascertain whether their affairs have been properly conducted by the directors or managers. Such a right is necessary to their protection. To say that they have the right, but that it can be enforced only when they have ascertained, in some way without the books, that their affairs have been mismanaged, or that their interests are in danger, is practically to deny the right in the majority of cases. Oftentimes frauds are discoverable only by an examination of the books by an expert accountant. The books are not the private property of the directors or managers, but are the records of their transactions as trustees for the stockholders."

2. The stockholders right to inspect the corporate books and papers is not absolute but qualified—can only be exercised for a definite and proper purpose.—The position that a stockholder has a right to inspect the corporate books and papers, merely because he is a stockholder, is not supported, as it seems to us, by either reason or authority. The rule, as we think, is correctly stated by a writer in the *Central Law Journal*, who says: "The principle is, that a stockholder in a trading corporation has the right to inspect its books and papers, and to take minutes from them, *for a definite and proper purpose*, at any reasonable time; and that if he is denied this privilege, the courts will lend him their authority by the process of *mandamus*." 23 Cent. L. J. p. 587 note. In other words the right of the stockholder is a right depending upon the time, place *and purpose*. *Grant Corp.* pp. 311, 312.

We are not aware of but three ways in which the common law right in question has been litigated; in petitions for a *mandamus* to enforce the right, in applications for a rule of court for the same purpose, made in a pending suit, and in suits for damages based on a denial of the right. It is well settled that a *mandamus* will not be granted, unless the petitioner shows some definite purpose for which such examination is necessary, or some substantial interest to be promoted thereby. The authorities upon this point will be presented later on, but the law is well put by Mr. High as follows: "It is to be borne in mind in the exercise of that branch of the jurisdiction by *mandamus* now under discussion, that the writ will not be granted merely to enable a corporator to gratify an idle curiosity in the examination of the corporate records, but he must show some specific interest at stake rendering the inspection necessary, or some beneficial purpose for which the examination is desired. And unless there is some particular matter in dispute between members of the corporation, or between the corporation and its individual members, or some specific purpose for which the inspection is necessary, *mandamus* will not lie, since the courts will not permit the use of the writ upon merely speculative grounds, or to gratify a spirit of curiosity. Nor will the writ be granted unless the relator shows that he has made a proper demand upon the proper parties having the records in custody, and that such demand was made at a fitting time and place and for a sufficient reason, and that the inspection was refused." High, *Extraordinary Legal Remedies*, § 810.

It is manifest that a rule of court would not be granted to compel an inspection, unless such inspection was pertinent to the matters in controversy in the case, so that it would only be granted when there was a definite and proper purpose to be subserved.

The fact that the *mandamus* and rule of court are only granted when there is some definite and proper purpose for the inspection, does not necessarily show that an absolute right to such inspection does not exist. The writ of *mandamus* is a prerogative writ and does not issue unless in aid of some substantial interest. A rule of court cannot be granted to vindicate a right or effect an object, entirely foreign to the suit in which it is made. If the stockholder merely wishes to vindicate a naked legal right, a suit at law for nominal damages is an adequate remedy and the only proper remedy. But the reasoning of the courts in the two classes of cases referred to, tends strongly to support the view that a stockholder's right to an inspection of books and papers is limited to occasions when there is some particular reason therefor.

The case of *Commonwealth v. Phoenix Iron Co.*, 105 Penn. St. 111, is a representative case, in which the rights of the stockholder underwent careful consideration. The case was a petition for a *mandamus*, and on the general rights of the stockholder in regard to inspection of books and papers the court says:

'Unless the charter provides otherwise, a shareholder in a trading corporation has the right to inspect its books and papers and to take minutes from them, for a definite and proper purpose, at reasonable times. The doctrine of the law is, that the books and papers of the corporation, though of necessity kept in some one hand, are the common property of all the stockholders. *Angell & Ames' Corp.*, § 681; *Redfield on Railways*, 227; *Grant on Corp.*, 311; 2 *Phillips on Evl.*, 813; *Martin v. Bienville Oil Works*, 28 La. Ann. 204. Cases

may have been rare in which it has been held that a shareholder was entitled to an extraordinary remedial writ for an enforcement of his right to inspect the books, but that does not evidence non-existence of the right. Text books ~~and~~ *dicta* of courts seem to have treated the right of shareholders in joint stock corporations to inspect the accounts and papers as similar to that of members in large partnerships where managers are appointed to transact the business. The necessary limitations practically prevent exercise of the right for speculative purposes or gratification of curiosity. If every shareholder could inspect for such purposes, at his own will, the business of most corporations would be greatly impeded. In *Rex v. Merchant Tailors Co.*, 2 Barn. & Ad. 115, Taunton, J., said: 'There is no express rule that to warrant an application to inspect corporation documents there must actually have been a suit instituted; but it is necessary that there should be some particular matter in dispute between members, or between the corporation and individuals in it; there must be some specific controversy, some specific purpose with respect to which the examination becomes necessary.' This concisely puts the circumstances in which the shareholder may have specific remedy if refused permission to inspect corporation documents and books; but if the right itself were not clear, he could not have that remedy at all."

The following cases are to the same effect. *Swift v. State ex rel. Richardson* (Del.), 6 Atl. Rep. 856; *Hatch v. City Bank*, 1 Rob. La. 470; *People ex rel. v. Walker*, 9 Mich. 328; *Matter of Sage*, 70 N. Y. 220; *People ex rel. Field v. Northern Pacific R. Co.*, 50 N. Y. Supr. 456; *Appeal of Empire Passenger Ry. Co. (Pa.)*, 2 Am. R. R. & Corp. Rep. 304, note; *Lyon v. Am. Screw Co.*, 16 R. I. 472; 17 Atl. Rep. 61; *Metropolitan Saloon Omnibus Co. v. Hawkins*, 4 H. & N. 146; *King v. Clear*, 4 Barn & Cress. 899; *King v. Merchant Tailors Co.*, 3 B. & Adolph. 115; *In re Barton and the Saddlers Co.*, 31 L. J. Q. B. 62.

If a stockholder has an absolute right to inspect the books and papers of the corporation at reasonable times, then a denial of the right is a wrong for which an action will lie, although a *mandamus* to enforce the right might be refused because no substantial interest was prejudiced: Cook says: "The legal right of a stockholder in a corporation to examine the corporate books is a right which gives him a cause of action at law for damages against the corporate officers if they refuse to allow the inspection. The plaintiff is entitled to nominal damages and to such further damages as he may prove. He need not allege or prove any special reason or purpose of his desire and request to examine the books" Cook, *Stock & Stockhs.* § 512. The only case he refers to relating to private corporations is that of *Lewis v. Brainard*, 53 Vt. 510. That was a suit for a penalty under a statute, and, therefore, in so far as the points *decided* are concerned, it is not in point in any respect. He also refers to some cases relating to public corporations, but those manifestly are not directly in point, but will be noticed later on.

The only case we are aware of in which a suit for damages has been brought, based on the common law right and duty, is the principal case, and that case failed because it was brought against the corporation, instead of against the custodian of the books. It is intimated that such a suit would lie, on the strength of the Louisiana cases already referred to. There are not, therefore,

outside of Louisiana any cases, which *in the points actually adjudicated*, support the proposition that a stockholder has an absolute right to examine the corporate books at any proper time and place.

Cooke says that the right "grew out of an analogous rule applicable to public corporations and to ordinary copartnerships, the books of which, by well established law, are always open to the inspection of members." Cook Stock & Stocks. § 511.

In regard to public corporations we have not examined the cases to any great extent, but we apprehend that there is no authority for saying that a citizen or corporator therein has, at common law, any absolute right to inspect the records or documents thereof. Whatever rights exist in this respect are now usually regulated by statute and most of the cases turn upon the construction of statutes. *Burton v. Tuite*, 1 Am. R. R. & Corp. Rep. 86 and note. In *Belt v. Prince George's County Abstract Co. (Md.)*, 3 Am. R. R. & Corp. Rep. 603, an abstract company sought to enforce a claim of right to examine and make abstracts or copies of the public records. The contention was "that the public records are public property, and kept for the public benefit, and, although their custody and safe keeping is committed by law to the clerk, yet every one has the right to examine them, and to make such copies as he sees fit, free of charge." Of this claim the court says: "It is not pretended that this right is a common law right, and, if it exists, then it must be founded upon statutory law." In that case, therefore, counsel did not even claim such a right at common law and the court dismissed the idea of such a right as preposterous. See *Buck v. Collins*, 51 Ga. 391; *Bean v. People*, 7 Col. 200.

Judge Dillon adopts the views of Mr. Willcock who says: "Every corporator has, as such, an interest in the documents of the corporation and a general right to inspect them upon all proper occasions, and if upon application for that purpose, the officer who has the custody refuse to show them, the court will grant a *mandamus* to enforce this right." Willcock, Corp. p. 347. In support of these views Dillon refers to the following authorities: *Rex v. Shelley*, 3 T. R. 142; *Rex v. Babb*, 3 T. R. 580; *Harrison v. Williams*, 3 Barn. & Cres. 162; *Rogers v. Jones*, 5 D. & R. 484; Willc. 347; *Glover*, 262. Now the phrase "proper occasions" may well include a *proper purpose* as well as a proper time and place. That this was the view of Willcock, we think, is plain, for he immediately adds the following: "A corporator has a right to inspect these documents, to obtain information as to his rights, *whether in a dispute with a foreigner, or the corporation itself, or any of its members.*" Willcock Corp. p. 348.

Glover (Munic. Corp. p. 262), simply repeats what Willcock says and refers to the same cases as Dillon. If these cases are examined it will be found, that in each one of them, the question arose upon an application for a rule, in a pending suit, in which the records sought to be inspected would furnish pertinent evidence. In *King v. Allgood*, 7 T. R. 746, an inspection was refused because no cause or controversy was depending and no purpose was shown. We think the analogy of public corporations furnishes no support for the proposition that a stockholder has an absolute right to inspect the corporate books.

There remains the analogy of the partnership. The argument here seems to

be that the corporation is in effect only a partnership, that the stockholders are joint proprietors of the corporate books and that, as such proprietors, they have the same rights as proprietors ordinarily have. Thus in *Lewis v. Brainard*, 53 Vt. 519, it is said: "The shareholders in a corporation hold the franchise, and are the owners of the corporate property; and as such owners they have the right, at common law, to examine and inspect all the books and records of the corporation, at all reasonable times." The analogy under consideration is based upon a false assumption and, if true, would prove too much. The stockholders are not the proprietors of the corporate property in any such sense as the members of a partnership are the proprietors of its property. *Louisville Banking Co. v. Eisenman*, 7 Am. R. R. & Corp. Rep. 569 and note. The analogy, therefore, fails.

Again, it is manifest that the stockholders are no more the proprietors of the corporate books than they are of any other corporate property. If such proprietorship as they have gives them a right to possess, use and handle the books, then the same principle would give them the same rights in the other property. But no one has ever supposed that a stockholder could ride free in a railroad train because he was a stockholder in the railroad company, or that he could occupy a room in a hotel because he was a stockholder in the company which owned it. The proprietorship of a stockholder does not give him any right to possess, use, handle or enjoy the corporate property, and this applies as well to the books as to the other property.

The right to inspect the corporate books and papers must rest upon some other basis. It may not be an easy matter to say just what this basis is. The stockholder is the ultimate party in interest. The corporate property is held, the corporate business conducted, and the corporate transactions recorded for his benefit. The officers who have control of the property and business are, in a sense, his trustees. But there is nothing in the nature of these things which should give him a right to examine the corporate books at pleasure. There are obvious reasons why he should not have that right. Where the stockholders are very numerous, the exercise of such a privilege might seriously impede the corporate business. But a more substantial objection lies in the opportunity thus afforded to hostile or rival concerns of acquiring a knowledge of the corporate affairs to be used to its injury. "If every shareholder in a large joint-stock association," says Morowitz, "were allowed to examine its books and accounts at pleasure, it would become impossible, in practice, to keep the books in a proper manner; moreover, it is evident that the result would be to lay open the affairs of the company to the public, and render any privacy in its dealings impossible." 1 Mor. Corp. § 473. Lord Campbell says in *Queen v. Mariquita, etc., Min. Co.*, 1 El. & El. 289; 102 E. C. L. R. 289: "It is highly proper that an inspection of the books containing the proceedings of the directors should be obtained on special occasions and for special purposes; but the business of such companies could hardly be conducted if any one, by buying a share, might entitle himself at all times to gain a knowledge of every commercial transaction in which the directors engage, the moment that an entry of it is made in their books."

In *people ex rel. Hatch v. Lake Shore & M. S. R. Co.* 11 Hun, 1, it is said. "To hold that every person who shows himself to be a holder of stock is at

liberty to demand an examination of the transfer books when, and as often as he pleases, and if refused, to apply for a writ of *mandamus* to enforce an absolute right, would be to establish a rule highly prejudicial to the interests of all corporations and their stockholders. A few inimical holders of stock could thereby produce great embarrassment and injury, and substantially prevent any large dealings in the stock by others. The power of the court should be exercised with great discrimination and care; and while stockholders should be carefully protected from any abuse, on the part of the corporation, of its powers, or unjust denial of their rights, so, on the other hand, courts should guard against all attempts of combinations hostile to the corporation, or its existing officers, to use its writ of *mandamus* to accomplish their personal or speculative ends."

On the other hand when the stockholder has some definite and proper purpose to be subserved by an examination of the corporate books, there is no reason in the nature of things why he should not have the right to make the examination. Such books contain the best evidence and often the only evidence of the corporate transactions. An examination of the books may be necessary to enable the stockholder to protect his rights. But his right being founded upon necessity should be limited by the necessity. As said by the supreme court of Connecticut in *Hemingway v. Hemingway*, 53 Conn. 443; 8 Am. R. R. & Corp. Rep. 302: "It may be admitted that a stockholder or a director in a joint stock corporation has the right at any reasonable and proper time to examine and inspect the books and papers of the corporation, whenever it is necessary to do so for the protection of his interests as a stockholder, or for the performance of his duties as a director. The statement of this right implies that such examination could not be had *at any other time or for any other purpose*; and it clearly implies that such examination could not be had for purposes hostile to the corporation."

This view of the qualified right of the stockholder is further sustained by many of the cases which have arisen upon statutes relating to the inspection of books by stockholders. Such statutes have been held to be an enlargement of the common law right and though conferring an absolute right in terms have been held to be qualified by implication. These cases are considered in a subsequent section of this note but the following are here referred to as in point. *Foster v. White*, 86 Ala. 467; *Queen v. Grand Canal Co.* 1 Irish L. R. 337; *Queen v. London & St. Catherine's Dock Co.* 44 L. J. Q. B. 4; *In re Emma Silver Min. Co.*, L. R. 10 Ch. 194; *King v. Wilts & Berks Canal Co.* 3 Adolph & El. 477. The code of Alabama, § 1177, provided that "the stockholders of all private corporations have the right of access to, inspection and examination of the books, records and papers of the corporation, at reasonable and proper times." In *Foster v. White*, 86 Ala. 467, the supreme court said of this section: "The statute was enacted in view of *the restrictions and limitations placed by the common law upon the exercise of the right.*"

3. What constitutes a proper purpose within the meaning of the rule.—A proper purpose for the inspection of the corporate books is one which relates to the substantial rights of the stockholder. "Either some property rights of the stockholder must be involved, or some controversy exist, or some

specific and valuable interest be in question, to settle which an inspection of the corporate records becomes necessary." Cook, Stock & Stockh's, § 515. See also King v. Clear, 4 Barn. & Cress. 899; Queen v. Mariquita & New Granada Min. Co. 1 El. & El. 289; 102 E. C. L. R. 289; State ex rel. Rosenfeld v. Einstein, 46 N. J. L. 479; People ex rel. Field. v. Northern Pac. R. Co. 50 N. Y. Supr. Ct. 456; In re Burton and the Saddler's Co. 31 L. J. Q. B. 62.

This general statement of the rule, of course, excludes the right to examine the books out of mere curiosity, or even for the *bona fide* purpose of becoming better informed as to the condition and affairs of the corporation when there is no definite object in view and no specific grievance to be righted. People v. Walker, 9 Mich. 328; Commonwealth v. Phoenix Ins. Co., 105 Penn. St. 111; Hatch v. City Bank, 1 Rob. La. 470; King v. Allgood, 7 T. R. 746.

All the authorities agree that when a suit is pending in which the stockholder is a party, or a *bona fide* controversy exists between the stockholder and any person, which might be the subject of a suit, in which suit or controversy the books and records of the corporation might afford material evidence or information, then, in such a case, a proper purpose exists and the stockholder is entitled to an inspection of such books and records. Grant Corp. p. 311; 1 Beach Priv. Corp. § 76; Cook Stock & Stockhs. § 515; Swift v. State ex rel. Richardson (Del.), 6 Atl. Rep. 856; Rogers v. Jones, 5 D. & R. 484; King v. Shelley, 5 T. R. 141; King v. Babb, 3 T. R. 579; Harrison v. Williams, 3 Barn. & Cress. 162; In re Burton, & The Saddlers Co., 31 L. J. Q. B. 62; In re Birmingham Banking Co., 36 L. J. Eq. 150; King v. Travannion, 2 Chitty, 366; Rex v. Fraternity, etc., 2 Strange, 1223 and cases cited in note.

The principal difficulty arises in determining what circumstances will give a right of inspection when there is no suit or controversy pending in which such inspection is necessary. In such case the authorities justify the conclusion that the stockholder must have good ground to believe that there has been mismanagement, fraud or wrongful acts on the part of the managing officers, prejudicial to his rights and interest, that an inspection of the books is sought with a view to some action on his part, by suit or otherwise, to protect his interests, and that such inspection is reasonably necessary for the purpose in view.

In King v. Merchant Tailors Co., 2 Barn. & Adolph, 115 (1831), a rule was granted against the master and wardens of the defendant company to show cause why a *mandamus* should not issue against them to permit an inspection of the books and papers of the company by certain members moving for the rule. The affidavits in support of the rule stated that there had been reports of mismanagement on the part of the governing body which the deponents believed to be true, and some particulars were specified, and that the inspection was desired only for the purpose of ascertaining how the joint funds were disbursed and to see that the legal rights and privileges of the members of the company were enjoyed by them agreeably to their charters. There were counter-affidavits in which the irregularities were denied and the motives of the applicants impunged. The rule was discharged. Lord Tenterden observed "that in all cases where a *mandamus* had been granted the application had been limited by some legitimate and particular object in which the party had an interest." Littledale, J., said: "I think the members have no right on specu-

lative grounds to call for an examination of the books and muniments, in order to see if by possibility the company's affairs may be better administered than they think they are at present. If they have any complaint to make, some suit should be instituted, some definite matter charged; and then the question will arise whether or not the court will grant a *mandamus*." Taunton, J., said: "It appears to me that if the members of every corporation had a right, on mere speculative grounds, to call upon the governing part of the body for an inspection of all the records, books and muniments belonging to it, the consequences would be endless confusion and inconvenience. It is admitted that no case can be found in which an application like this has been successfully made; and in the absence of authorities I think this court ought not to establish such a precedent. There is no express rule that to warrant an application to inspect corporation documents there must actually have been a suit instituted; but it is necessary that there should be some particular matter in dispute between members, or between the corporation and individuals in it; there must be some controversy, some specific purpose in respect of which the examination becomes necessary." Patterson, J., also concurred in an opinion to the same effect. This case is a correct exponent of the common law of England to this day.

In *People ex rel. Bishop v. Walker*, 9 Mich. 328, the relator was a large stockholder in a plank road company and the defendant was secretary and custodian of its books and papers. The case was a motion for a *mandamus* based on an affidavit of the relator, which failed to show any reason for an examination of the books except "a desire to examine, inspect and have access to said books, records and papers, to ascertain the condition of said company, as well as to ascertain and determine the rights, duties, privileges and liabilities, and for the protection of this deponent as such stockholder." The motion was denied on the ground that no proper purpose was shown and also on the ground that the demand alleged was not shown to have been made at the office of the company during business hours. Christianity, J., concurred upon the second ground alone. Martin, Ch. J., said: "I have examined all the cases to which we have been referred, and can find none where the writ was granted to enable a corporator to gratify idle curiosity. The principle seems to be, and very properly too, that the party asking the writ must have some interest at stake which renders the inspection necessary."

The fact that a company, previously prosperous, has for some time paid little or nothing in dividends and that its stock has depreciated, affords no ground for an inspection of the books by a discontented stockholder, when no mismanagement is alleged and no particular object shown. *Lyon v. American Screw Co.*, 16 R. I. 472; 17 Atl. Rep. 61.

In *People ex rel. Hatch v. Lake Shore & M. S. R. Co.*, 11 Hun, 1, the applicants for a *mandamus* alleged that the directors of the defendant company were mismanaging its property and running its road in the interest of other roads in which they were interested and to the prejudice of the defendant company and of the applicants. They sought an inspection of the stock books for the purpose, as alleged, of communicating with the stockholders, so that they might have an opportunity to co-operate and consult together "as to using proper means to protect their interests and the property of the company from

further depreciation." The charges of mismanagement were denied. The court refused the inspection because no sufficient grounds were shown.

In Appeal of Empire Passenger Ry. Co., 19 Atl. Rep. 629; 2 Am. R. R. & Corp. Rep. 304 note, a *mandamus* was refused because no sufficient purpose was shown, the object of the relator being, as alleged, to obtain a list of stockholders in order to induce them to join him in a suit against the company to set aside a lease of all its property for a term of years.

The case of Hatch v. City Bank, 1 Rob. La. 470, is to the same effect as the foregoing cases, but has been overruled by the later cases of Cockburn v. Union Bank, 13 La. Ann. 289, and State ex rel. v. Bienville Oil Works Co., 28 La. Ann. 204.

Turning to the cases in which an inspection has been granted, although no suit or controversy was pending, we think they will be found to support the general rule above laid down. In Commonwealth v. Phoenix Iron Co., 105 Penn. St. 111, it was made to appear that the petitioner for *mandamus* was a large stockholder in the defendant company, that, although it had done a large and prosperous business, it had paid no dividends for nine years, that the business of the company had been largely absorbed by a firm, of which the managing officers were the principal owners, that they had formed a partnership between the firm and the company, and that the company was being run in the interests of the firm, that the petitioner proposed filing a bill for relief against the company, and that he desired access to the books in order to obtain information on certain specified points. The *mandamus* was granted. We have already quoted from the opinion in this case.

The case of Huylar v. Cargin Cattle Co., 40 N. J. Eq. 392, has already been noticed. It was an application to the chancellor under a statute for an order to bring the books of the corporation within the state for inspection by the plaintiff. The statute provided that such an order might be made on "proper cause shown." The right was thus put upon substantially the same basis as the right at common law to inspect books already within the state. The petition showed that the stock of the company had depreciated, that the president of the company was pasturing a large number of cattle on the company's ranch and that no account thereof was given in the reports made to the stockholders, and that any information as to the business of the company was refused the petitioners, who owned about one-fourth of its stock. The petition did not show that the applicants had any object in view, beyond ascertaining the facts as to the condition of the company and the irregularities alleged. The application was granted and the chancellor, in a passage already quoted, defined the rights of a stockholder in this regard, rather more broadly than the case required.

Mitchell v. Rubber Reclaiming Co. (N. J. Eq.), 24 Atl. Rep. 407, was a similar application to Vice-chancellor Bird. The petitioner in that case had been a director and president of the company. During his absence, by permission, on account of ill-health, a dividend had been declared and paid, which the petitioner had accepted. He subsequently learned that the dividend had probably been improperly declared so as to subject the directors consenting thereto, to certain statutory liabilities. He sought an inspection of the books, with a view to taking such action as might be necessary to avoid this liability.

in case the truth was as he had reason to believe. The order applied for was granted, but the case is clearly within the general rule we have laid down above. Both these decisions are by single judges and, however eminent they may be, their opinions cannot be considered as carrying any great weight of authority. See, also, *State ex rel. Rosenfeld v. Einstein*, 46 N. J. L. 479.

The cases of *Cockburn v. Union Bank*, 18 La. Ann. 289, and *State ex rel. v. Bienville Oil Works Co.*, 28 La. Ann. 204, have already been referred to quite at length. (See § 1 of this note.) While the former case sustains the right of a stockholder to inspect the corporate books without showing any particular occasion for it whatever, the latter case does not necessarily support any such unqualified right. The relator was a large stockholder. An election was about to be held for the purpose of voting upon a reduction of the capital stock. The officers of the company had neglected for many years to make and publish an annual statement of the receipts and expenditures and condition of the company as required by the charter, and refused the relator access to the books. The object of the relator was to acquire information whereby he could vote intelligently at the election about to be held. This election was different from an ordinary election of officers, since the propriety of reducing the capital stock would depend upon the condition and business of the company. Although it did not appear that the interests of the petitioner were in any danger, it did appear that he was about to act in an important matter affecting his interest in the corporation, and that an examination of the books was necessary in order to enable him to determine how to act.

On the whole, therefore, we think the authorities very strongly support the view that a stockholder is not entitled to an inspection of the corporate books, unless there is some suit or controversy pending to which he is a party and in which such examination is necessary, or unless there is some reasonable ground to believe that his interests in the corporation have been, or are in danger of being prejudiced, that some action on his part is contemplated, or at least possible, for the protection of his interests, and that an inspection of the books is necessary to that end.

4. What will be deemed an improper purpose and when inspection may be denied.—It follows from what is said in the last section that an inspection of the corporate books may be denied to a stockholder, when he does not show a proper purpose for such inspection as therein explained. It would, of course, follow, also, that an inspection may be denied when the inspection is sought for some improper purpose, that is for some purpose hostile to the interests of the corporation. Thus an inspection will not be granted to a shareholder to enable him to prove a plea of justification in a suit against him for libel in imputing insolvency to the company. *Metropolitan Saloon Omnibus Co. v. Hawkins*, 4 H. & N. 146. So, a stockholder may be denied access to the books when there is reason to believe that his object is to make entries therein to substantiate certain claims of his own. *State ex rel. Rosenfeld v. Einstein*, 46 N. J. L. 479. A stockholder and director of a corporation who is active in the management of a rival corporation, has no right to examine the books and papers of the former for the benefit of the latter. *Hemingway v. Hemingway* (Conn.), 2 Am. R. R. & Corp. Rep. 302. But in *Mitchell v. Rubber Reclaiming Co.* (N. J. Eq.) 24 Atl. Rep. 407, it is held that the fact that the petitioner

intends to make an improper use of information gained by an inspection of the books, is no reason for denying him such inspection, when he otherwise makes out a clear right to such inspection and has not himself brought about the conditions which give him such right. "If the charge upon which a party rests his case be free from odium," says the court, "the general rule is that he is entitled to have that right protected, whatever may be his motive in asking the aid of the court for that purpose." See also *State ex rel. Spinney v. Sportsman's Park and Club Asso.* 29 Mo. App. 826; *State ex rel. Wilson v. St. Louis, etc., R. Co.* 29 Mo. App. 801.

5. An unwarranted inspection of the corporate books and records may be prevented by force.—This is held in the case of *Hemingway v. Hemingway*, 2 Am. R. R. & Corp. Rep. 303, which was a suit for an assault by a stockholder against the secretary of a company, who had forcibly taken from the plaintiff a letter file of the corporation, which the latter was examining for the benefit of a rival company.

6. Right to make memoranda and copies.—The right to inspect carries with it the right to take extracts, copies and memoranda from the books, so far as necessary for the purpose in view. *Cotheal v. Brouwer*, 5 N. Y. 562; S. C., 10 Barb. 216; *Swift v. State* (Del.), 6 Atl. Rep. 856; *Martin v. W. J. Johnston Co. (Limited)*, 63 Hun, 557; 1 Beach Corp. § 75; 2 Spell. Corp. § 657; 1 Red. Rys. p. 213. In this respect it is immaterial whether the right is claimed under a statute or under the common law. The case of *Appeal of Empire Passenger Ry. Co. (Penn.)*, 19 Atl. Rep. 629; S. C., 2 Am. R. R. & Corp. Rep. 804, seems to hold a different view. The constitution of Pennsylvania provides, that "every railroad and canal corporation organized in this state shall maintain an office therein, where transfers of its stock shall be made, and where its books shall be kept for inspection by any stockholder or creditor of such corporation," etc. Const. 1874, Art. 17, § 2. The relator claimed the right not only to inspect the stock list but to copy the same. Of this the court says: "The constitution of 1874 does not confer any such right. It simply provides that a list shall be kept at the office of the company, and that it shall be open to the inspection of stockholders and creditors, but does not confer the right to take copies of the list." This particular point however was not necessary to the decision, as the court held that the relator was not entitled even to an inspection of the books for the purpose alleged.

7. Of the right to employ agents or attorneys to make the inspection.—A statute provided that certain books should be "open for inspection by stockholders, creditors, and their personal representatives." It was held that an application by a stockholder must be made by him in person, and that an application by his attorney was insufficient. *People v. U. S. Mercantile Reporting Co.*, 20 Abb. N. C. 192. The contrary was held in *Mitchell v. Rubber Reclaiming Co. (N. J. Eq.)*, 24 Atl. Rep. 407. The better rule undoubtedly is that the right is one which may be exercised by one's authorized agent or attorney. 1 Beach. Corp. § 75; *In re Birmingham Banking Co.*, 36 L. J. Eq. 150; *State v. Bienville Oil Works Co.*, 28 La. Ann. 204. In the last case it is said: "The possession of the right in question would be futile if the possessor of it, through lack of knowledge necessary to exercise it, were debarred the right of procuring in his behalf the services of one who could exercise it."

8. Demand and refusal—time and place.—A proper demand is a demand of the proper person at a proper time and place. The proper person is the one having the custody of the books by the authority of the corporation. The demand should be made at the office or place where the books are kept during ordinary business hours. *People v. Walker*, 9 Mich. 328; *Lewis v. Brainard*, 53 Vt. 510. Where a statutory right is relied upon, the party should bring himself within the statute by a demand in strict compliance therewith. *People v. Walker*, 9 Mich. 328; *Kennedy v. Chicago, etc., R. Co.*, 14 Abb. N. C. 326; *Queen v. London, etc., Dock Co.*, 44 L. J. Q. B. 4. The demand should not be too broad, but limited to the books which the party is entitled to see. *Queen v. London, etc., Dock Co.*, 44 L. J. Q. B. 4. A demand of the stock book is not sufficient as a demand for the transfer book. *Kennedy v. Chicago, etc., R. Co.*, 14 Abb. N. C. 326. The custodian should be informed that the demandant is a stockholder, and for what purpose the inspection is desired. *Williams v. Gravel Road Co.*, 45 Ind. 170; *King v. Wilts & Berks Canal Co.*, 3 Adolph. & El. 477; *King v. Clear*, 4 Barn. & Cress. 899; 1 Beach Priv. Corp. §§ 75, 78. This would not apply in cases where the right is held to be absolute. Where a statute imposed a penalty of ten dollars upon the custodian for every twenty-four hours of neglect or refusal, it was held that the demand need not be repeated every twenty-four hours in order to fix the penalty. *Lewis v. Brainard*, 53 Vt. 510.

There must, of course, be a wrongful refusal of inspection in order to lay the foundation for any action. The affairs of a corporation were managed by a committee, who appointed a clerk to keep the books. A proprietor applied to the clerk to inspect the books and was referred to the committee. He then applied to the committee, and they took time to consider it. Ten days later the proprietor again applied to the clerk, and was refused. It was held that he could not maintain any action until there had been a refusal by the committee, that it was proper for them to take time to consider, and he should have renewed his demand upon them. *King v. Wilts & Berks Canal Co.*, 3 Adolph. & El. 477.

9. The stockholders remedy in general—suit for damages.—There are but two ways in which an inspection of books can be enforced a rule of court and a writ of *mandamus*. The former is available when a suit is pending and the inspection is sought for some purpose connected with the suit. *King v. Shelley*, 3 T. R. 141; *King v. Babb*, 3 T. R. 579; *Harrison v. Williams*, 3 Barn. & Cress. 162. A bill of equity will not lie to compel an inspection because there is an adequate remedy at law by *mandamus*. *Stettaner v. New York, etc. Co.* 42 N. J. Eq. 46.

A suit for damages will lie for a wrongful refusal, *Cook, Stock & Stockh.* § 312; 1 Beach Corp. § 78. The principal case is also an authority in point. To maintain such a suit the plaintiff must show a proper demand and facts entitling him to an exercise of the right. The action should be against the custodian of the books, unless the corporation has previously authorized or subsequently ratified the refusal, in which case it may be against the corporation or both. *Legendre v. New Orleans Brewing Ass.* (the principal case.) This remedy is ordinarily inadequate, because it does not secure the object sought and because there is usually no way of estimating the damages. *Cockburn v. Union Bank*, 13 La. Ann. 289.

10. The remedy by mandamus.—*Mandamus* is an appropriate remedy to compel an inspection of books and is the one usually resorted to. *Foster v. White*, 86 Ala. 467; *Winter v. Baldwin*, 89 Ala. 483; 2 Am. R. R. & Corp. Rep. 402; *Swift v. State*, (Del.) 6 Atl. Rep. 856; *Cockburn v. Union Bank*, 13 La. Ann. 289; *State v. Bienville Oil Works Co.* 28 La. Ann. 204; *People v. Walker*, 9 Mich. 328; *State v. Sportsman's Park Club Ass.* 29 Mo. App. 326; *State v. St. Louis, etc., R. Co.* 29 Mo. App. 301; *People v. Throop*, 12 Wend. 181; *Commonwealth v. Phoenix Iron Co.* 105 Penn St. 111; *Lyon v. American Screw Co.* 16 R. I. 472; 17 Atl. Rep. 61; *State v. Bergenthal*, 72 Wis. 814; *Queen v. Lond. & St. Catherine's Dock Co.* 44 L. J. Q. B. 4; *Ring v. Travannion*, 2 Chitty 366; *King v. Merchant Tailors Co.* 3 Barn. & Adolph. 115; *High on Extr. Rem.* § 808; 1 Beach, Corp. § 78; *Cook, Stock & Stockh.* § 513; 2 Spell. Corp. § 655. As in other cases the application for the writ is addressed to the sound discretion of the court. *People ex rel. Field v. Northern Pacific R. Co.* 50 N. Y. Supr. Ct. 456; *People ex rel. McDonald v. U. S. Mercantile Reporting Co.* 20 Abb. N. C. 192; *People ex rel. Hatch v. Lake Shore & M. S. R. Co.* 11 Hun. 1; *Commonwealth v. Phoenix Iron Co.* 105 Penn. St. 111; *Lyon v. American Screw Co.* 16 R. I. 472; 17 Atl. Rep. 61; *Queen v. London, etc. Dock Co.* 44 L. J. Q. B. 4; 2 Spell Corp. § 658; *Cook, Stock & Stockh.* § 514; 1 Beach on Corp. § 79. The application for the writ should show a proper purpose or occasion for an examination of the books and a proper demand as already explained, (see sections 3 and 8 of this note) and that such demand has been refused. It should of course show that the applicant is a stockholder. *People ex rel. Field, v. Northern Pacific R. Co.* 50 N. Y. Supr. Ct. 456; *Foster v. White*, 86 Ala. 467. The application should specify the books or documents of which an inspection is desired. *Morgan's Case*, L. R. 28 Ch. Div. 620; *State ex rel. Rosenfeld v. Einstein*, 46 N. J. L. 479; *Queen v. London, etc. Dock Co.* 44 L. J. Q. B. 4.

An application to inspect all books, records, documents, etc., belonging to the corporation is too broad, unless it is made to appear that an inspection of all is necessary. *King v. Merchant Tailors' Co.*, 2 Barn. & Adolph, 115; *State ex rel. Rosenfeld v. Einstein*, 46 N. J. L. 479.

The writ should run against the officer or agent who has the actual custody and control of the books in question. *High Ex'tr. Rem.* § 311; *People v. Throop*, 12 Wend. 181; *Swift v. State* (Del.), 6 Atl. Rep. 856; *Winter v. Baldwin* (Ala.), 2 Am. R. R. & Corp. Rep. 402. It of course follows that the custodian is the only necessary party defendant. In *Winter v. Baldwin*, 2 Am. R. R. & Corp. Rep. 402, it was held that the corporation was not a proper party. But in *Swift v. State* (Del.), 6 Atl. Rep. 856, it was held, that while the corporation was not a necessary party, it was a proper party in order that it might show any reason why the inspection should not be granted. When the corporation has authorized or ratified the action of the custodian, there would seem to be no question but what it would be a proper party.

11. Statutes relating to the right of a stockholder to inspect the corporate books and records—construction generally.—These statutes are collected in 2 Stim. Stat. Law, § 8042, §§ 39, 40. The code of Alabama, § 1677, provides as follows: "The stockholders of all private corporations have the right of access to, inspection and examination of the books,

records and papers of the corporation, at reasonable and proper times." In a proceeding by *mandamus* to enforce the rights conferred by this statute the Supreme Court of Alabama says: "The statute was enacted in view of the restrictions and limitations placed by the common law upon the exercise of the right; and the purpose is to protect small and minority stockholders against the power of the majority and against the mismanagement and faithlessness of agents and officers, by furnishing mode and opportunity to ascertain, establish and maintain their rights, and to intelligently perform their corporate duties. Its terms are clear and comprehensive, and afford narrow room for construction. It was intended to enlarge and disembarass the exercise of the right; rendering it consistent and co-extensive with the stockholder's right, as a common owner of the property, books and papers of the corporation, and with the duties and obligations of the managing officers, as agents and trustees. The only express limitation is, that the right shall be exercised *at reasonable and proper times*; the *implied* limitation is, that it shall not be exercised from idle curiosity, or for improper or unlawful purposes. In all other respects, the statutory right is absolute. The shareholder is not required to show any reason or occasion rendering an examination opportune and proper, or a definite or legitimate purpose. The custodian of the books and papers cannot question or inquire into his motives and purposes. If he has reason to believe that they are improper or illegitimate, and refuses the inspection on this ground, he assumes the burden to prove them such. If it be said, this construction of the statute places it in the power of a single shareholder to greatly injure and impede the business, the answer is, the legislature regarded his interests in the successful promotion of the objects of the corporation a sufficient protection against unnecessary or injurious interference. The statute is founded on the principle, that the shareholders have a right to be fully informed as to the condition of the corporation, the manner in which its affairs are conducted, and how the capital, to which they have contributed, is employed and managed." *Foster v. White*, 86 Ala. 467.

Such statutes are generally held to be remedial and to be liberally construed to advance the remedy, even though they impose a penalty. *Lewis v. Brainard*, 53 Vt. 510; *People v. Pacific Mail Steamship Co.*, 50 Barb. 280; *Huyler v. Cragin Cattle Co.*, 40 N. J. Eq. 392.

12. Whether a proper purpose must be shown when statute silent on the subject.—When the statute is silent as to the purpose for which the examination may be made, the authorities differ as to whether the right is absolute or is qualified by the implied condition that it shall only be exercised for a definite and proper purpose. The following cases support the view that the right is absolute according to the terms of the statute, and that the courts cannot introduce any qualifications: *Fisher v. White*, 86 Ala. 467; *State ex rel. Wilson v. St. Louis, etc., R. Co.*, 29 Mo. App. 301; *State ex rel. Spinney v. Sportmans' Park & Club Ass.*, 29 Mo. App. 326; *Kennedy v. Chicago, etc., R. Co.*, 14 Abb. N. C. 326; *People ex rel. McDonald v. U. S. Mercantile Reporting Co.*, 20 Abb. N. C. 192; *Lewis v. Brainard*, 53 Vt. 510; *State ex rel. Bergenthal v. Bergenthal*, 72 Wis. 314. The following cases hold that though the right is given in general and unqualified terms, yet it can only be exercised for some definite and proper purpose. *Appeal of Empire Passenger Ry. Co.*

(Penn.), 2 Am. R. R. & Corp. Rep. 304, note; Queen v. Grand Canal Co., 1 Irish L. R. 337; Queen v. London, etc., Dock Co., 44 L. J., Q. B. 4; In re Emma Silver Mining Co., L. R., 10 Ch. 194.

The Constitution of Pennsylvania provides as follows (1874, art. 17, § 2) "Every railroad and canal corporation organized in this state shall maintain an office therein, where transfers of its stock shall be made, and where its books shall be kept for inspection by any stockholder or creditor of such corporation, in which shall be recorded the amount of capital stock subscribed or paid in, and by whom, the names of the owners of its stock, and the amounts owned by them respectively, the transfers of said stock, and the names and places of residence of its officers." In the case cited it was held that the right thus conferred could only be exercised for a reasonable and proper purpose, and because no such purpose was shown in that case an inspection was denied. Appeal of Empire Passenger Ry. Co., 2 Am. R. R. & Corp. Rep. 304, note. In the case of Queen v. Grand Canal Co., 1 Irish L. R. 337, the defendant's charter provided "that all the accounts, transactions and proceedings of said company shall be fairly and regularly entered in books kept for that purpose, to which every person having in his own name and right any share in such joint stock, or his or her representative or representatives, may have access at all reasonable times to inspect." The only ground alleged for an inspection was dissatisfaction with the mode in which the affairs of the company were conducted. The application was refused.

Burton, J., said: "The court must see that the application is made on reasonable grounds, and upon grounds which it would be unreasonable not to enforce. The proprietor might use his privilege so far as to impede the business of the company in the exercise of this right." And Perrin, J., added: "The meaning of the act is not that the books and proceedings of the company are to be always open for inspection. Each proprietor is entitled, for any useful purpose, to see the books and proceedings of the company, but he has not the right to go into the company's office at all times and require this inspection, which we would decide if we granted the present application."

In Foster v. White, 86 Ala. 467, it is said that there is an implied condition that the right shall not be exercised from idle curiosity, or for improper or unlawful purposes. But in State ex rel. Spinney v. Sportsmans' Park & Club Ass., 29 Mo. App. 326, and State ex rel. Wilson v. St. Louis, etc., R. Co., 29 Mo. App. 301, it was held that the fact that the applicant sought an inspection of the books for an improper purpose was immaterial, and evidence tending to establish such fact was held to have been properly excluded.

Whatever might be the ruling in an action for damages for a wrongful refusal, it would seem that a writ of *mandamus* should not be granted unless some definite and proper purpose is shown for the inspection sought. In this respect the case of Queen v. London, etc., Dock Co., 44 L. J. Q. B. 4 lays down the correct doctrine. That was a case under the companies clauses act, 8 Vict., c. 16, § 115, which requires companies to keep full and true accounts of all money received and expended, and to appoint a bookkeeper for that purpose, and provides that such bookkeeper "shall permit any shareholder to inspect such books, and to take copies or extracts therefrom, at any reasonable time during the prescribed periods, and if no periods be prescribed, during one

fortnight before, and one month after every ordinary meeting." A *mandamus* to inspect the books was denied because no proper purpose was shown, and Blackburn, J., says: "Now, here the case is that the statute requires the company for six weeks to give inspection to their shareholders of their books, which have to be kept to show how every shilling comes and goes, and where it is. Then, whether we should enforce that right of the shareholder, is within our discretion. The chairman says the books contain particulars of many transactions which in the interest of the company it is undesirable to disclose, but that some risk must be incurred in making a disclosure of all matters, is not to be taken to be a conclusive test. I am guided by the cases of *The Queen v. The Wilts & Berks Canal Company*, 4 B. & C. 899, and *The Queen v. The Grand Canal Company*, 1 Ir. Law. Rep. 387, which seem to me to afford some grounds for the exercise of our discretion; and I think accordingly that a man ought in such a case as this to show that he is making a demand which is practicable and available, that his object is a legitimate one, and possesses for him an advantage proportionate to the disadvantage it brings to others, in order that the benefit to him may not appear to be so small as not to justify us in causing a great inconvenience to others."

13. Whether a statute displaces the common law right.—A statute permitting an inspection of the stock book and minute book, does not, on the principle of exclusion, deprive a stockholder of the common law right of inspecting other books. *Cockburn v. Union Bank*, 13 La. Ann. 289. So a statute providing for an inspection of the stock book and list of stockholders for thirty days before an election, leaves the common law right of inspecting the same books at other times unimpaired. *Matter of Sage*, 70 N. Y. 220; *People ex. rel. Stobo v. Ealie*, 133 N. Y. 573; 30 N. E. Rep. 1147; affirming S. C. 63 Hun, 320; *People ex rel. Hatch v. Lake Shore, etc. R. Co.* 11 Hun, 1.

14. Construction of statute as to books included.—In construing this class of statutes it has been held that the words, "books wherein the proceedings of the company are recorded," refer to the records of meetings of shareholders and not of directors. *Queen v. Mariquita & New Granada Min. Co.* 1 El. & El. 289; 102 E. C. L. R. 289. Books "containing the stock subscriptions and accounts," were held to include not only books containing the stock accounts but also the general accounts of the company. *State ex rel. Bergenthal v. Bergenthal*, 72 Wis. 314. The word "records" includes the stock ledger and transfer book but not the business accounts. *Lewis v. Brainard* 53 Vt. 510; *Lewis v. Brainard*, 53 Vt. 519.

If the statute requires the corporation to keep certain specified books which shall be open to inspection, etc., but it fails to keep the precise books specified, it is bound under the statute to permit an inspection of such books as it does keep, containing information appropriate to the books specified. *People v. Pacific Mail Steamship Co.* 50 Barb. 280.

15. Whether custodian must be in constant attendance during time specified by statute.—A statute of New York requires a book to be kept showing the names and residences of stockholders "which book shall, during the usual business hours of the day, on every day except Sunday and

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the fourth day of July, be open for inspection of stockholders and creditors of the company and their personal representatives, at the office or principal place of business of such company in the county where its business operations shall be located." For a neglect or refusal to exhibit the same as required the statute imposed upon the corporation a penalty of fifty dollars. In a suit for the penalty it appeared that the plaintiff went to the office of the defendant company on Saturday and called for the book. He was told by the president that it was in the safe, that one P. was the only one who knew the combination and that he was absent in New York but would return on Monday. Plaintiff went Monday and saw the book. It was held that there was no violation of the statute. The court says: "It was evidently enacted for the purpose of affording protection to the stockholders and creditors of the company; its object was to give a liberal opportunity at all reasonable times to examine the books and to punish the persons in charge who should willfully and intentionally deprive them of such examination. It appears that the company had provided a safe in which the books were kept. This was but a reasonable and proper precaution as a guard against burglars and fire. Mr. Puffer was the clerk who kept the books and had charge of them. He had the key and combination of the safe. If he was necessarily called away temporarily for a short time it does not appear to us it would be unreasonable to request the plaintiff to wait until the morning of the next business day to see the books. To hold that the officer left in charge of the office under such circumstances should become liable to a conviction for a misdemeanor and the company to a penalty of fifty dollars, appears to us to be unreasonable and unjust."

16. Foreign corporations.—In *People ex rel. Field v. Northern Pacific R. Co.*, 50 N. Y. Supr. Ct. 456, it is held that there is no common-law jurisdiction to compel an exhibition of the books of a foreign corporation. The contrary was held in *Swift v. State ex rel. Richards* (Del.), 6 Atl. Rep. 856, and this would seem to be the better rule. The court says: "If it holds real and personal property in the state of Delaware and transacts business incidental to its business within the state of Connecticut, it holds such property and transacts such business by the comity of the state. Its president lives here, and is the *custos* in fact of the documents and papers, an inspection of which, and the privilege of taking copies of which, the relator seeks. The corporation itself does business here, not as a corporation created by the state of Delaware, but as a corporation created by the law of Connecticut. What results from this? That acting here as a foreign corporation, and holding real and personal property, and doing business as such within this state, it submits or subjects itself to the law of the state, in the same manner and to the same extent, in respect to such property and business, as it would be bound to do were it a corporation created by the state of Delaware, and owes obedience and subjection to the mandates of its courts in these respects as fully as if it were a domestic corporation."

In *Winter v. Baldwin* (Ala.), 2 Am. R. R. & Corp. Rep. 402, it was held that a state statute as to the examination of the books, records and papers of private corporations, by the stockholders thereof, was applicable to national banks. Such banks are foreign corporations so far as the state is concerned. *Bank v. Gunst*, 1 Abb. N. C. 292.

New York has a statute requiring foreign corporations doing business in the state to keep a transfer book and list of stockholders in the state, which shall be open to the examination of stockholders. 2 Stim. Stat., § 8406. This statute was in question in *People v. St. Louis, etc., R. Co.*, 44 Hun, 552; *Kennedy v. Chicago, etc., R. Co.*, 14 Abb. N. C. 326; *People v. Lake Shore, etc., R. Co.*, 11 Hun, 1; and see *Ervin v. Oregon, etc., R. Co.*, 22 Hun, 566.

17. Defenses.—A defense to an action to enforce or vindicate the right of inspection, may be made out by disproving any of the essential grounds upon which it is founded; as that the plaintiff is not a stockholder, that he has not made a proper and sufficient demand, that there has been no refusal of such demand, or that no proper occasion exists for the inspection. A denial that the plaintiff is a stockholder should be positive and not evasive, in order to be effectual. *Martin v. W. J. Johnston Co.*, 62 Hun, 557. It is no defense that the petitioner for a *mandamus* is president of the corporation and ought to know what the books contain. *Mitchell v. Rubber Reclaiming Co. (N. Y. Eq.)*, 24 Atl. Rep. 407. The fact that the board of directors have general control of the books and property of the corporation and have refused an inspection, is immaterial. *Cockburn v. Union Bank*, 18 La. Ann. 289; *State v. Bienville Oil Works Co.*, 28 La. Ann. 204. The fact that, in a proceeding for *mandamus*, the relator is a non-resident is likewise immaterial. *Swift v. State (Del.)* 6 Atl. Rep. 856. An inspection will not be refused on the ground of inconvenience to the corporation. *State v. St. Louis, etc., R. Co.*, 29 Mo. App. 301. A purpose to injure the corporation may be a defense. See section 4 of this note. But the question of such a purpose cannot be raised on a motion to quash an alternative writ of *mandamus*. *State v. Bergenthal*, 72 Wis. 314. In a proceeding by *mandamus* to compel an exhibition of the stock list and transfer book under a statute, it was held that a judgment refusing a *mandamus* to produce the same books at the relation of the same plaintiff and against the vice-president and transfer agent of the corporation, was no bar to a *mandamus* against the corporation. *State v. St. Louis, etc., R. Co.*, 29 Mo. App. 301.

18. Right of directors to inspect the corporate books and papers.—A director being one of the governing body and responsible to the stockholders, would seem to have a larger right than a stockholder to an inspection of the books and papers. *People v. Onderdonk*, 1 How. Pr. 247; *State ex rel. Rosenfeld v. Einstein*, 46 N. J. L. 479; *People v. Throop*, 12 Wend. 181.

19. Public corporations.—We refer to the following cases relating to the inspection of the records of public corporations, which may be of interest in this connection: *Burton v. Tuite (Mich.)*, 1 Am. R. R. & Corp. Rep. 86 and note; *Belt v. Prince George's County Abstract Co. (Md.)*, 3 Am. R. R. & Corp. Rep. 603; *Brewer v. Walsin*, 61 Ala. 310; *U. S. Express Co. v. Henderson*, 69 Iowa, 40; *People v. Cornell*, 47 Barb. 329.

ATCHISON, T. & S. F. R. Co. v. SHEAN.

(Supreme Court of Colorado, May 1, 1893.)

1. RAILROAD COMPANIES. INJURY TO PASSENGER CROSSING TRACK AT EATING STATION. FAILURE TO LOOK AND LISTEN. Where a train stops at an eating station, and there is a track between the train and the station, a passenger alighting from the train has the right to assume that the railroad company will so regulate its trains that its tracks between the car and the eating station platform will be safe for him to pass over in going to and returning from the eating house, and his failure to look and listen for an approaching train is not negligence.

THIS action is brought by Mary E. Shean, the wife, and in behalf of Moses, Josephine, and Mary Shean, the children, of Thomas Shean, deceased, to recover damages against the railroad company for wrongfully causing the death of said Thomas Shean. The facts are as follows: Thomas Shean was a passenger for hire from Kansas City, Mo., to San Francisco, Cal., on the appellant company's cars. On the 1st day of October, 1887, the section of the train in which he was being carried arrived at La Junta, Colo., between 8 and 9 o'clock in the forenoon. La Junta is an eating station of the company, and a point at which trains stop to allow passengers to take meals, and also at which trains are made up for the north and west. The train was being run in two sections between Kansas City and La Junta, Shean being on the section that arrived first. After stopping at the eating station, this section was switched upon a side track, the main track being between it and the station. While so standing, and about forty minutes after its arrival, Shean started to go to the eating station for breakfast. While passing diagonally across the main track he was struck by the locomotive drawing the other section, and killed. The testimony of witnesses as to the rate of speed this section of the train was running at the time varies from six to ten miles an hour. It was also conflicting in regard to whether the bell was being rung at the time of the accident. The following specific interrogatories were submitted to the jury, and answered as follows: "First. Do you find from the evidence that the deceased, Thomas Shean, after leaving the car, and before reaching the track where

he was injured, listened or looked for an approaching train? Answer. No. Second. Do you find from the evidence that if the deceased, Thomas Shean, had looked, before going upon the track where he was injured, he could have seen the approaching train? Answer. Yes. Third. Do you find from the evidence that if deceased, Thomas Shean, had stopped and listened before going on the track, he could have heard the approaching train? Answer. No." General verdict for plaintiffs for \$5,000. Motion for new trial overruled, and judgment rendered for amount of verdict.

Charles E. Gast, Wells, Macon & Furman, and Rogers, Cuthbert & Ellis, for appellant; Rogers & Shafroth, for appellees.

GODDARD, J. (after stating the facts).—The ground mainly relied on in the argument before us, and the one we regard as controlling in this case, is whether, upon the evidence, the deceased at the time of the accident exercised such care as an ordinarily prudent man would exercise under like circumstances. In other words, was he guilty of such contributory negligence as would defeat a recovery? The fact is uncontroverted, as found by the jury in answers to interrogatories Nos. 1 and 2, that the deceased did not, on approaching the track where he was injured, look or listen for an approaching train, and that, if he had looked before going upon the track, he could have seen the approaching train; and the question is thereby presented whether the deceased, in his relation as a passenger, had the right to omit the precaution of looking for an approaching train, and, as the court below instructed the jury, "assume that the defendant must so regulate its trains that its tracks between the car he left and the eating station platform would be free from obstruction, and safe for him to pass over in going to and returning from the eating house; * * * that defendant is bound to exercise the same degree of care in providing for him a safe and convenient way and manner of access to and from the eating station * * * as in the transportation and carriage of him." It is said by this court in *Railroad Co. v. Hodgson*, 31 Pac. Rep. 956; 18 Colo.—: "The appellant, a common carrier, owed a peculiar duty to the deceased, a passenger for hire. It was bound to exercise the highest degree of care and skill reasonably practicable in the management of its trains. This duty did not cease upon the arrival of the

train upon which the deceased was a passenger at the place of his destination. The company was still bound to furnish him an opportunity to safely alight therefrom, and to use the utmost care and diligence in providing for him a safe passage from the train to the platform of the depot." The same duty, we think, is imposed upon the company towards a passenger while, on a continuous journey, he is going to and returning from the eating stations provided by the company for the accomodation of passengers. While leaving the train for this purpose he does not cease to be a passenger, or lose the protection of those regulations that the company is bound to provide for his safety while on its cars, or when rightfully upon its depot grounds. The same rules of law can be invoked for his protection under such circumstances as are afforded to passengers going to and from its cars. Their duty in the latter respect is well settled. *Railroad Co. v. Hodgson, supra*. In the case of *Railroad Co. v. White*, 88 Pa. St. 333, it is said: "It is the duty of the company to provide for the safe receiving and discharging of passengers. It is bound to exercise the strictest vigilance, not only in carrying them to their destination, but also in setting them down safely, if human care and foresight can do so." That the deceased had a right to rely on the performance of such duty by the company, and proceed without taking the precaution to look and listen, and that the failure to do so is not negligence *per se*, is decided in numerous cases. To this effect are: *Terry v. Jewett*, 78 N. Y. 338; *Brassel v. Railroad Co.*, 84 N. Y. 241; *Archer v. Railroad Co.*, 106 N. Y. 589; 13 N. E. Rep. 318; *Jewett v. Klein*, 27 N. J. Eq. 550; *Baltimore & O. R. Co. v. State*, 60 Md. 449. In *Baltimore & O. R. Co. v. State*, 60 Md., at page 463, it is said: "And though the deceased himself was required to exercise reasonable care, yet we may suppose that his watchfulness was naturally lessened by his reliance upon the faithful observance by the employes of the defendant of such precautionary rules and regulations as would secure to passengers a safe transfer; * * * and, except in the presence of immediate, apparent danger, he was authorized to act upon such reliance." In the case of *Jewett v. Klein*, 27 N. J. Eq. 550, it is held "that a person who, in passing from the depot to the train he was about to take, was obliged to cross an intervening track, was not guilty of contributory negligence in that he did not, before approaching the train, look up or

down the track to see whether there was danger from an approaching train, and in that he approached the train diagonally from the platform to the station, and before his train had come to a full stop." By the foregoing and other well considered cases it is settled that a passenger on a railroad, while passing from the cars to the depot is not required to exercise that degree of care in crossing a railroad track as is imposed upon other persons, and that he has the right to assume that the company will discharge its duty in making the way safe; and, relying on this assumption, may neglect precautions that are ordinarily imposed upon a person not holding that relation; and this distinction is to be taken into consideration in determining the propriety of his conduct. Under all the facts shown in evidence and the circumstances surrounding the accident, whether the person injured was guilty of contributory negligence at the time is a question within the province of the jury to decide, and one that the court cannot rightfully take from them. In addition to the cases above cited, see *Warren v. Railroad Co.*, 8 Allen, 227; *Gaynor v. Railroad Co.*, 100 Mass. 208; *Parsons v. Railroad Co.* (N. Y. App.), 21 N. E. Rep. 145; *Wheelock v. Railroad Co.*, 105 Mass. 203. In the case at bar we think the law was correctly given to the jury, and that their finding on the facts cannot be disturbed. An examination of other points presented by appellant discloses no error that is a cause of a reversal of the case.

The judgment is accordingly affirmed.*

Railroad companies—injury to passenger crossing track to or from train.—The following cases present some analogy to the foregoing. In an action against a railroad company for death by wrongful act, plaintiff's testimony was that deceased, after leaving a train at a small way station, stopped to help a family, including two small children, to alight from the car, and started towards the station, purposing to spend the night there. In so doing he stepped upon an intervening track, which had been leveled up with earth for crossing, and was struck by a train which was moving rapidly without ringing a bell. The family that deceased had assisted barely escaped, and two members thereof testified that they did not know that they were walking upon a track, and had no idea that an engine was approaching. There was no light except a bonfire and the locomotive headlights. There was some conflicting testimony as to these facts, but the jury gave a verdict for plaintiffs. Held, that defendant was not entitled to an instruction that deceased was guilty of contributory negligence. *Richmond & D. R. Co. v. Powers*, 149 U. S. 43; 13 S. C. Rep. 748.

* Reported in 33 Pac. Rep. 108.

A passenger on a steam motor railway notified the conductor that she desired to alight at a certain station, but was carried beyond it, and upon a switch, where she was allowed to alight. The engine, meanwhile, had been disconnected from the coach, switched on to the main track, and was coming back to connect with the other end of the coach for the return trip, when it struck and injured plaintiff, who was crossing the track to go to her home. No special warning was given, and several witnesses testified that no bell was rung, or whistle sounded. Held, it was eminently a case for the jury both as to negligence and contributory negligence, and a verdict in plaintiff's favor would not be disturbed. *Franklin v. Southern California M. R. Co.*, 85 Cal. 63; 24 Pac. Rep. 723.

Plaintiff wishing to reach a train, between which and himself another train was standing on a down grade, walked along some thirty feet past the engine of the latter, and, turning, stepped on the track in front of it. He did not look back nor listen, and was struck by it and injured. Neither the bell nor whistle was sounded, and there was no evidence that the engineer saw his perilous position in time to warn him, or knew he would attempt to cross. Held, he was guilty of contributory negligence, and could not recover. *East Tenn. V. & G. R. Co. v. Kornegay*, 92 Ala. 228; 9 So. Rep. 557.

Plaintiff is not negligent as a matter of law who on hearing his train approaching the flag station, where he is, and seeing no train coming in the opposite direction, goes diagonally across the first track, which was planked, towards his train, which has nearly stopped, and is still when he reaches his car, though a witness called by him says that, before the passenger train stopped, the freight, which struck plaintiff, was passing. *Kohler v. Pennsylvania R. Co.*, 135 Penn. St. 346; 19 Atl. Rep. 1049. If plaintiff knew, or might by the use of his senses have known, that the freight train was coming, and crossed in front of it to a dangerous position, through fear that his train coming on the next track might not wait, he cannot recover. *Ibid.*

MILWAUKEE ST. RY. CO. V. ADLAM ET AL.

(Supreme Court of Wisconsin, May 2, 1893.)

1. STREET RAILROAD COMPANIES. PAVING STREET. OBSTRUCTING PASSAGE OF STREET CARS BY CONTRACTORS INJUNCTION. Contractors, under a contract with a city to pave a certain street, have no power to obstruct the passage of street cars over such street during the paving of the same, where the contract gives no such power, and it is shown that such work has been, and can be, done without such interference, and such interference may be prevented by injunction.

ACTION by the Milwaukee Street Railway Company against A. B. Adlam and others to restrain defendants from obstructing the passage of plaintiff's cars over a certain street. From an order dissolving a temporary injunction, plaintiff appeals.

It appears that prior, to 1892, Third street, between Harmon and Walnut streets, in Milwaukee, had been macadamized. That in May, June, and the fore part of July, 1892, the requisite steps had been taken to authorize the removal of from nine to eleven inches of said macadam, and to repave the same with cedar blocks. That July 15, 1892, the defendants Adlam & Mosher, as parties of the first part, and Crilley & O'Donnell, as parties of the second part, and the city of Milwaukee, as party of the third part, entered into a written contract wherein and whereby the said Adlam & Mosher agreed, in effect, to and with the city, to furnish all material and do all work necessary and required to grade and pave the roadway with cedar blocks on Third street, from Walnut to Harmon streets, under the superintendence of the board of public works of the city, for the sum of \$1.19½ per square yard for the paving, which should include all necessary grading, and that they would complete said work according to specifications. That it was therein further agreed that the said board of public works should have the right and power, which was thereby reserved to them, to adjust and determine finally all questions, and that such adjustment and determination should be final and conclusive between the parties to said contract. That the said Adlam & Mosher would during the night-time put up and maintain such barriers and lights as would effectually prevent the happening of any accident in consequence of the digging up, use, or occupancy of said street, and that the parties of the first part and second part thereby assumed the liability for, and would pay, on demand, any and all damages occasioned by the digging up, use, or occupancy of said street in doing said work. That thereupon Adlam & Mosher sublet a portion of said job to the defendant Roehring. That the said defendants thereupon entered upon the performance of said contract. That September 23, 1892, the plaintiff commenced this action to restrain the defendants from obstructing in any manner the running of said cars over said street, or to do grading and paving thereon in such way and in such a manner as to prevent the plaintiff from running its cars along the same, or to interfere with the running thereof, directly or indirectly, or the operation of its railroad. That the complaint alleged, among other things, the incorporation of the plaintiff; that it had eighty

miles of track in said city, and was engaged in carrying passengers in said city over the same; that its cars were passing each day over the street in question for more than fourteen hours, carrying many thousand passengers, and that said transportation of passengers over said track, and other tracks in the city, was of great convenience and benefit to the public; that the said Adlam & Mosher had the contract mentioned, and had sublet a portion thereof to the said Roehring; that in the execution of said contract the defendants threatened to obstruct and prevent the running of said cars on said street, and gave out that they would stop the same by the erection of barriers; that for many years previously many of the streets in said city, over which said street cars were run, had been repaired and repaved, and the grading done necessary for such repairs and repaving, without interfering with the running of such cars, and that the grading and paving in question could reasonably and properly be done without such interference; that it was the duty of the defendants to so grade and repave said street as to allow said cars to continue to run thereon. That thereupon a preliminary injunction was granted, restraining the defendants from interfering with the running of said cars, by a court commissioner. That the defendants thereupon answered said complaint by way of admissions and denials, and alleged, in effect, that the grading and paving of said street was a great public improvement; that the street was much traveled, and was a public thoroughfare, and it was necessary to public travel that it should be completed as soon as practicable; that it was impracticable and impossible for the defendants to do the work required by the terms of said contract unless they had possession of said street, or at least one-half thereof, upon which to do said work; that it had always been customary in the city, whenever any street was graded and paved upon which said railway was located, either for the railway company to grade the portion of the street occupied by its tracks, and pave the same, or to put in temporary switches at a distance of from one to two blocks apart, so that the cars of said company might be switched in on to a single track for such distance, and thus enable the contractor to occupy one-half the street in grading or paving the same. That said answer was verified, and thereupon and upon the record, said answer, and the affidavits of John Roehring and Fred Gottschalk, the defendants ob-

tained an order to show cause, September 30, 1892, why said temporary injunction should not be modified, vacated, and dissolved. That the said answer was supported and corroborated, in part, by the affidavits of said Roehring and Gottschalk, and stated, among other things, that the portion of Third street in question was fifty feet in width from curb to curb, and that the plaintiff's tracks occupied about sixteen feet in the middle of said street, and that the cars extended beyond the track about eighteen inches in addition. That upon the hearing of said application the plaintiff read in evidence, in support of its complaint, seven affidavits, one of which was made by the chief engineer of the plaintiff, of many years' experience, and of much experience in the city, who gave in detail the method of the doing of such work, and its necessities, and among other things, stated in effect, that the work could be done without hardship and without delay, without interfering with the running of the plaintiff's cars, and that to accomplish that end it was not necessary that the contractors should have the use of the entire street, or of one-half thereof; that there remained of said street, outside of both tracks, more than sufficient ground so that they could, with ease and comfort, do the work under said contract without interfering with the running of the plaintiff's cars; that other streets, under similar circumstances, had been so regraded by the defendants and other contractors without interfering with such cars,—and giving the contracts made with two such other contractors, and one with the defendants Adlam & Mosher in relation to which he stated that the said Adlam & Mosher did the work on Walnut street between Thirtieth and Twenty-fourth streets, which consisted in grading and paving Walnut street between said streets, and that said work was done by them after July 21, 1892, and had been completed, and that they represented to the plaintiff that it would cost them, in addition, if the plaintiff's cars were allowed to run while they were doing said work, five cents per square yard, measured in the track, and on the side next to the curbing, and they agreed to perform said work without interfering with the running of said cars while doing the same, and allow the cars to run across the same while the men were engaged in such work, at a reasonable speed, by the plaintiff paying them said five cents per square yard, and produced the written contract between the plaintiff and the said Adlam & Mosher, and also six other

affidavits to some extent corroborating the same. Upon the hearing of said application it was ordered by the trial court that the said preliminary injunction theretofore granted therein by said court commissioner be, and the same was thereby dissolved. From that order the plaintiff brings this appeal.

Miller, Noyes & Miller, for appellant; *Austin & Hamilton*, for respondents.

CASSODAY, J. (after stating the facts).—This action is not against the city, but is only against its contractors engaged in the work of repairing the street, as mentioned in the foregoing statement. The contract of the defendants with the city is silent as to whether the defendants, in doing the work, were authorized to obstruct or interfere with the running of cars by the plaintiff on the street in question. Of course, it implies such occupancy of the street during the time as might be reasonably necessary to perform the work according to their contract. There is no claim or pretense that the plaintiff's tracks were not lawfully and rightfully in the street in question at the time of making such contract, nor that the plaintiff was not lawfully and rightfully running its cars thereon. The permission to the railway company to use the street for the purposes indicated does not imply that the municipality thereby surrendered its right to make needful police regulations respecting the same, nor that the company was thereby authorized to unnecessarily obstruct the street, or interfere with travel thereon, or to negligently operate its cars. *Elliot, Roads & S.* 334. It may be fairly inferred that the defendants entered into the contract, and agreed to perform the work at the price therein named, with reference to the condition of the street and the railway tracks, and the running of cars thereon, at the time it was made. The primary object of a public street in a city is for public travel. *Jochem v. Robinson*, 66 Wis. 641; 29 N. W. Rep. 642; *Hay v. Webber*, 79 Wis. 590; 48 N. W. Rep. 859. As appears from the foregoing statement, the plaintiff is extensively engaged in the carriage of passengers upon the street in question, and other streets in the city. Assuming that, under its police power, the city had authority to arbitrarily stop the running of such cars during the time of such repaving, and that it might have delegated such power to these contractors (questions not here decided) yet it does not ap-

pear that the city has delegated any such power to the defendants, nor that it has attempted to exercise any such power. On the contrary, as will appear from the foregoing statement, the contract seems to contemplate the continuance of travel of some kind upon the street pending the performance of the work. Hence the provisions for putting up and maintaining barriers and lights at night to prevent accidents. Certainly, for much of the time, such cars would not be as likely to interfere with such repaving as other vehicles, since the cars would at all times move upon fixed lines. The public had as much right to travel by such cars as they had by other vehicles. To allow the contractors to arbitrarily stop the cars, and permit other vehicles to continue running on that street, pending the work, would be to authorize an unwarrantable discrimination against, not only the plaintiff, but also against persons desiring to travel upon that street in the cars. It is fairly demonstrated by the affidavits in the record that there was no necessity for stopping the running of the cars over the street in question during such repairing. In fact it appears that other contractors—and, in one instance, these defendants—had repaved streets on which the plaintiff's tracks were located under agreements that they would not interfere with the running of cars thereon, at a reasonable speed, while doing the work. True, in such other cases, the contractors, respectively exacted of the company, and the company paid, five cents per square yard, measured in the tracks and on the side next to curbing, as a condition of their not interfering with the running of the cars thereon at a reasonable speed while doing the work; but that fact does not support the contention that such stoppage was an absolute, or even a reasonable necessity. On the contrary, it fairly demonstrates that, while such continuous running slightly interfered with the performance of the work, yet that there was no reasonable necessity for absolutely suspending the running of cars. Such slight interference naturally suggests a slight increase in the cost of the work; but the price for doing the work is purely a matter of contract, and, as indicated, it may be fairly assumed that it was taken into account in making the contract in question. However that may be, the defendants have no contract relations with the plaintiff, and cannot enforce the making of such contract, or the payment of money, on the theory that there is a necessity that the running

of the cars should be absolutely suspended, when it is thus demonstrated that no such necessity exists. While the defendants had the right to interfere with the running of such cars, so far as it became reasonably necessary in the performance of the work, yet such right to so hinder or obstruct was by no means absolute or continuous, but at most temporary, depending upon such necessity; and such necessity must have depended upon the width of the street, the nature of the work, the conditions of the weather, the duration of the obstruction, and perhaps other circumstances. The question is somewhat similar to the interference of travel upon streets and sidewalks by abutting owners, which has received some consideration from this court. *Jochem v. Robinson*, 66 Wis. 642; 29 N. W. Rep. 642; *Raymond v. Kiseberg*, (Wis.), 54 N. W. Rep. 612. In *Coke Co. v. Vestry of St. Mary, Abbott's*, 15 Q. B. Div. 5, the municipality was restrained from using steam rollers in repairing the street, in a way to injure the plaintiff's gas pipes in the earth beneath. Lindley, L. J., speaking for the court said: "The authorities and particularly *Asylum Dist. v. Hill*, 6 App. Cas. 193, show that an action lies for an injury to property, unless such injury is expressly authorized by statute, or is, physically speaking, the necessary consequence of what is so authorized." In *Hamilton v. Railroad Co.*, 119 U. S. 280; 7 Sup. Ct. Rep. 206, the right of the railroad company to construct a bridge over a navigable stream in a way to interfere with the navigation thereon was involved; and Mr. Justice Field, giving the opinion of the court, said: "Two conditions, however, must be deemed to be embraced within this implied power,—one, that the bridges should be so constructed as to insure safety to the crossing of the trains, and be so kept at all times; and the other, that they should not interfere unnecessarily with the navigation of the streams." That language has been quoted approvingly by this court. *J. S. Keator Lumber Co. v. St. Croix Boom Corp.*, 72 Wis. 86; 38 N. W. Rep. 529. It follows from what has been said that the rights of neither of the parties to this action were absolute, as against the other, in respect to the street in question, but the rights of each were relative with respect to the duties and obligations of the other and the traveling public generally. The order of the superior court of Milwaukee county is reversed, and the cause is remanded for further proceedings according to law.*

* Reported in 55 N. W. Rep. 181.

Obstructing cars and interfering with wires of street railway by moving house along street—rights of railway company.—The case of *Williams v. Citizens' Ry. Co.*, 130 Ind. 71; 29 N. E. Rep. 408, presents some analogies to the foregoing. In that case the railway company had constructed and had in operation, under due authority, an electric railway on Main street in the city of Elkhart. The city council had granted the defendants permission to move a house through the streets of the city and they were threatening to move it along Main street and to cut and remove the company's wires to make way for the house. The company filed a bill to enjoin the threatened interference with its road. The injunction was granted by the lower court and affirmed by the supreme court. It was held that by the grant to construct and operate its road the plaintiff had acquired property rights which neither the city nor individuals could destroy or materially impair, and that the courts would protect such rights. It was further, in effect, held that the permit to move the house was subject to the rights of the company and was to be availed of in such way as not to materially interfere with such rights.

In *Elliott on Roads and Streets* (p. 578) it is said: "The right vested in a street railway company is of such a nature as to make it wrongful for any one to negligently use that part of the street occupied by its tracks so as to unnecessarily injure them. An extraordinary use of that part of the street upon which the tracks are laid may subject the person who uses it, and who fails to exercise ordinary care to protect the tracks from injury, to an action. Thus where a person engaged in moving a house negligently injured the track of a street railway, it was held that he must respond in damages."

DOOLY BLOCK ET AL. V. SALT LAKE RAPID TRANSIT CO.

(Supreme Court of Utah, June 5, 1898.)

1. **ELECTRIC RAILWAYS IN STREETS. RIGHTS OF ABUTTING OWNERS IN STREETS.** Where public land is entered and platted under the town-site act, (Rev. St. U. S. § 2387 *et seq.*), the purchasers of lots abutting on a platted street acquire the easements of access, light, and air; and they are entitled to have the street forever kept open, though the fee may be in the town as trustee for the public, instead of in the abutting owners for street uses.

2. **A REASONABLE PORTION OF A STREET MAY BE DEVOTED TO STREET RAILWAY USES WITHOUT COMPENSATION TO ABUTTERS.** Municipal corporations, when empowered by the legislature to do so, may devote a reasonable portion of the street to the use of a street railway, without making compensation to abutting owners, since such is a proper use of the street.

3. **BUT THE ENTIRE WIDTH CANNOT BE SO USED WITHOUT COMPENSATION.** The easement of abutting owners on a street are property rights; and, whether the fee of the street is in such owners or in the city in trust for street uses, the legislature cannot devote the entire width of the street to railroad purposes, unless compensation is first made to the owner for the taking of his easements, though there may be no special constitutional restriction on the legislature.

4. **DISTINCTIONS BASED UPON OWNERSHIP OF FEE OF STREET DISAPPROVED.** The distinction, formerly held between cases where the fee of the street is in

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the public and cases where it is in the abutting owner, as to the uses which might be made of the street by the public authority, has been mostly abrogated by recent judicial decisions holding that in all cases the abutting owner has easement of light, air, and access, which are as much property as the lot itself.

5. CONSTRUCTION OF STATUTORY POWERS TO CONTROL STREETS AND THE LOCATION OF RAILROAD TRACKS THEREIN. 1 Comp. Laws 1888, § 340, which authorizes Salt Lake City "to exclusively control" the streets, and "prevent the incumbering of streets in any manner, and protect the same from encroachment and injury," confers no power on the city to devote the entire width of the street to railroad uses, so as to injuriously affect the property rights of abutting owners.

6. 1 Comp. Laws 1888, § 389, subd. 5, which empowers Salt Lake City "to direct and control the location of railroad tracks and depot grounds within the city," does not authorize the city council to devote the entire width of a street to railroad uses, where such uses will injure and materially depreciate the property of abutters.

7. LOCATION OF A THIRD RAILROAD TRACK IN A STREET ENJOINED. Where a street is already incumbered with two street-railroad tracks, with a line of poles between, and, in addition, with many electric light, telegraph, and telephone poles on both sides of the street, an injunction will issue in favor of abutting owners against the construction of a third track and additional poles, though authorized by the city council, since such a track is a special injury to the property right of abutters; it appearing that the tracks already in the street afford ample facilities to run all cars necessary for public convenience.

8. PRACTICE. EFFECT OF FINDING OF FACTS BY A COURT OF CHANCERY. Where a cause is tried by a court sitting as a court of chancery, the findings of fact are conclusive on the appellate court, unless they are so manifestly erroneous as to demonstrate some oversight or mistake.

Parley L. Williams, for appellant; *Bennett, Marshall & Bradley*, for respondents.

BARTCH, J.—The respondents are the owners of certain lots situate in Salt Lake City, and abutting on Second South street, between Main and Second West streets. Two of these lots, one on the north, the other on the south, side of Second South street, are one block west of Main street, are business property, and at the time of the trial of the cause business blocks were being erected thereon. The complaint, in substance, charges that the plaintiffs were respectively the owners of that portion of the street which lies between the centre line thereof and the front line of the said lots, subject only to the ordinary use of the public for the purposes of travel; that the plaintiffs are entitled to the free and unobstructed use of the street as a means of access to the said premises;

that by authority of Salt Lake City the Salt Lake City Railroad Company constructed on that street a double-track railroad, with wires, poles, and other appurtenances necessary to operate the same with electric power; that the same was being so operated, and afforded all necessary means and convenience to persons who might have occasion to travel on street railroads; that telegraph and telephone lines, and wires and poles for electric light, had been constructed on the street; and that by reason of the several uses with which it had thus been burdened the ordinary use thereof for public travel and ingress and egress to the several premises had become impeded and embarrassed; that on the sixth day of May, 1890, and after the said street had been burdened as aforesaid, Salt Lake City, by its council, granted the defendant herein authority to construct and operate, by electric power, a street railroad on said street from First East to Seventh West street; that because of the obstructions already existing thereon, and because another railroad was not necessary for public convenience, the resolution granting the franchise to the defendant was unreasonable and void; that, in pursuance of the authority thus granted, the defendant commenced the construction of a railroad, and threatened to complete the same unless restrained; and that another railroad constructed thereon with its equipment and operation, in addition to the already burdened condition of the street, would greatly depreciate the value of the plaintiff's property, and injure its convenient use and enjoyment. The defendant in its cross complaint, in substance alleges that it owns and operates various lines of street railroads in the city and remote parts thereof, and in densely populated localities in the eastern portion of the city; that for public convenience it should have a line through the business portion of the city, to connect with railway depots and other parts of the city lying west of Main street; that defendant had no franchise connecting its eastern lines with the western portion of the city through the business part thereof, except the one on Second South street; and that in the granting of franchises the city has denied the right to parallel existing lines except in this instance. The trial court, in substance, found the above allegations of the plaintiffs and defendant to be true, and, among other things, found as facts that the plaintiffs are the owners of equitable easements in

fee of rights of access, ingress, and egress to their respective lots in front thereof in the street, and entitled to the free and unobstructed use of that portion of said street as a means of access, such easements extending along the street from the first north and south street east of said lots to the first north and south street west of such lots, the same being subject to the ordinary use of the street by the public; that the fee of the street is in Salt Lake City, in trust for street uses proper; that prior to the granting of said franchise by the city there were constructed and in operation on that street a double-track street railroad, telegraph and telephone lines, wires and poles for electric lighting and the street had already become greatly obstructed, and access to plaintiff's property impeded and embarrassed; that because of the obstructions already existing upon the street the resolution attempting to grant the franchise to the defendant was unreasonable and void; that the two tracks in operation on said street were sufficient to satisfy the demands of public convenience, and there was no necessity for a third track; that its construction would greatly depreciate the value of plaintiff's property, interfere with its convenient use and enjoyment, and they would thereby suffer irreparable damage; that Salt Lake City in granting the franchise to defendant, did not act within its lawful authority, nor exercise reasonable discretion for the best interests or convenience of the public; that the two tracks were constructed and are being operated in front of said lots by the Salt Lake City Railroad Company, and are sufficient to permit the passage of all street cars necessary for public convenience, and between the third track, proposed to be constructed, and the sidewalk there would not remain sufficient space for the ordinary traffic of the street, free from unreasonable obstructions; that the defendant has electric street-car lines in operation in the eastern and western portions of said city, but has no other connecting line or franchise except the one on said Second South street passing through the business portion of the city, or reaching the depots of the several steam railroads, such connecting line being of great importance to the defendant, and necessary for the public travel; that the defendant company and the Salt Lake City Railroad Company can operate both their railways together by means of the two tracks of the last-mentioned company now on that street, which tracks afford sufficient track privileges for all the cars op-

erated, or necessary to be operated, by both companies for public travel and convenience; and that the construction and maintenance of a third track would be an unnecessary obstruction and interference with the ordinary use of the street, and the means of access to plaintiff's premises would be unreasonably and materially abridged and injured. Upon this state of facts the trial court granted an injunction perpetually restraining the defendant from constructing and operating a third track on said Second South street. The defendant moved the court for a new trial upon the following grounds: First. "Insufficiency of the evidence to justify the findings of the court and decree in said case, and that the same were against law." Second. "Errors in law occurring at the trial, and excepted to by the defendant." From the order overruling this motion the defendant appealed to this court.

This leads to the inquiry as to whether or not the construction and operation of the third track upon that street by the defendant involves the taking of property of the plaintiffs, and as to whether the city council of Salt Lake City exceeded its limits of discretion and authority in granting the franchise to defendant. The plaintiffs contend that they are the owners in fee of the lots above mentioned abutting on Second South street, and, as such abutting owners, they are entitled to so much of the bed of the street as lies immediately in front of the lots and to the centre of the street, on which the proposed third track is to be built, subject only to the ordinary use of the same for the purposes of public travel, and that they are entitled to the use of said street, free from unreasonable obstructions, as a means of access, light, and air to their premises. The defendant maintains that the fee of said street is vested in the corporation of Salt Lake City, and that plaintiffs have no property therein, but are only entitled to the use thereof in common with the people of the city. The plaintiffs admit that the fee is in the city, in trust, however, for street uses proper, and subject to the equitable easements in fee of abutters. The lots and street in question are a part of a larger tract entered under section 2387 (Rev. St. U. S.), which provided that the corporate authorities might enter any portion of the public lands settled upon and occupied as a town site, "in trust for the several use and benefit of the occupants thereof, according to their respective interests." Plaintiffs' lots were represented on the original plat of Salt Lake

city as fronting Second South street, which was platted in said plat, and when they were purchased under the forms prescribed by the town-site act the grantees secured the right and privilege to have the street forever kept open. When land is settled upon and occupied as a town site, and lots are sold, the right of way over the streets in front of such lots is an appurtenance of necessity and it requires no special grant in the deed. *Ashby v. Hall*, 119 U. S. 526; 7 Sup. Ct. Rep. 308; *Salisbury v. Andrews*, 128 Mass. 336. The rights of access, light, and air constitute the principle values of such property, and it must be presumed that when lots are sold the grantees purchase them with a view to the advantages and benefits which attach to them because of these easements. The right of the grantee to their use is precisely the same as his right to the property itself. Such privileges are easements in fee,—incorporeal hereditaments,—and form a part of the estate in the lots. They attach at the time the land is platted and the lots are sold, and will remain a perpetual incumbrance upon the land burdened with them. It follows that, when land is platted by the owner of the soil, and lots sold, bounded by a street designated and marked on the plat, the grantee acquires a right to the street in front of the premises as a means of access. 1 Hare, *Const. Law*, 376; Lewis, *Em. Dom.* § 114; *Story v. Railway Co.*, 90 N. Y. 122; *Wyman v. Mayor, etc.*, 11 Wend. 487; *Child v. Chappell*, 9 N. Y. 246; *Schulte v. Transportation Co.*, 50 Cal. 592; *City of Denver v. Bayer*, 7 Colo. 113; 2 Pac. Rep. 6. Nor does it matter, in this case, that the fee is in the city in trust for the use of the public, instead of in the abutting owners for street uses. Equally in both cases the abutting owners are entitled to the use of the street as a means of access to their lots, and for light and air. If the fee is in the city, the rights of the abutter are in the nature of equitable easements in fee; if in the abutter, they are in their nature legal. In either case the abutters have the right to have the street kept open and not obstructed so as to interfere with their easements, and materially diminish the value of their property. When the lots of plaintiffs were sold under the town site act, above mentioned, it was, in effect, agreed with the grantees that they were entitled to the use of the street as a means of ingress, egress, light and air. These rights were inducements to purchasers, became a part of the purchase, are appurtenances to the land which can-

not be so embarrassed or abridged as to materially interfere with its proper use and enjoyment, and they are, in effect, property of which the owners cannot be deprived without due compensation. By implication, at least, the grantees also assumed additional burdens, for they must contribute of their own funds for the expense of sewer, gas, and water connections, and as well towards the cost of sidewalks, paving, and sprinkling in front of their lots. These are expenditures which devolve upon them as abutting owners, and, in addition to the relation of their lots to the street, give them a special interest in the street in front of their premises, distinct from that of the public at large. Assuming such burdens, they may of right make any and all proper uses of the street, subject to proper and reasonable municipal control and police regulations. Lewis, Em. Dom. § 115; 2 Dill. Mun. Corp. (4th Ed.), §§ 556a, 556b; *McQuaid v. Railway Co.*, 18 Or. 237; 22 Pac. Rep. 899; *Haynes v. Thomas*, 7 Ind. 38; *Story v. Railway Co.*, *supra*. The right of municipalities to grant franchises to private corporations for the construction and operation of street-railways when empowered by the legislature so to do, is not now, it seems an open question, although streets were originally not designed for that purpose, but were mostly confined to the right of public travel in the ordinary modes. Enlightened public policy, advanced civilization, and a desire to subserve public interest, have induced courts to become more lax in the enforcement of strict technical rules and principles in this regard, and it appears now to be well settled by judicial authority that a reasonable portion of a street may be devoted for the purposes of a street railway, and that such is a proper use of the street.

Counsel for appellant contend that, subject to special constitutional restrictions, the legislature has plenary power over all public ways and streets. If this position be tenable, then, in the absence of special constitutional restrictions, the legislature may authorize municipalities to devote the entire width of a street to railroad uses, regardless of the property rights of abutting owners, without compensation for injury to their property. This theory does not appear to be sustained by the authorities. The legislature may delegate power over streets to municipalities, but in doing so it must recognize the property rights of private individuals. Judge Dillon, in his work on *Municipal Corporations* (vol-

ume 2, § 656a), speaking of the nature of streets and legislative control, says: "Public streets, squares, and commons, unless there be some special restriction when the same are dedicated or acquired, are for the public use, and the use is none the less for the public at large, as distinguished from the municipality, because they are situate within the limits of the latter, and because the legislature may have given the supervision, control, and regulation of them to the local authorities. The legislature of the state represents the public at large, and has, in the absence of special constitutional restraint, and subject (according to the weight of more recent judicial opinion) to the property rights and easements of abutting owners, full and paramount authority over all public ways and public places." It will be observed that the learned author distinctly recognizes "the property rights and easements of abutting owners," and, subject to these, the legislature "has full and paramount authority over all public ways and public places." Up to within a comparatively recent date, the current of judicial opinion drew a distinction between cases where the fee was in the abutting owner, subject to street use proper, and those where the fee was in the municipality in trust for the use of the public. In the latter class of cases it was uniformly held that the power of the legislature to authorize the construction of a railroad on the street of a city was paramount, and that it could delegate such power to the local authorities. Of the exercise of this power the abutting owner could not complain, and had no right to compensation for injury to his easement caused by the appropriation of the street to such purposes. In the former class of cases he was entitled to compensation for the injury sustained by such appropriation. The case of *Railroad Co. v. Hartley*, 67 Ill. 439, supports this view. Mr. Justice Scott, in deciding the case said: "A distinction has been taken where the municipality granting the right to lay the track owns the fee in the streets, and where the fee remains in the abutting owner, and it seems to us that it rests on sound principle, and is supported by the highest authority." That case was decided in January 1873, and such, it must be conceded, was the weight of authority at that time. Then the cases turned upon the question whether the fee was in the public or in the abutter, in many of them without close inquiry as to the exact limitation of the fee; and it was almost universally held that, if the fee was

in the abutter, the legislature could not authorize a private corporation to construct a railroad upon a public street without compensation to the abutter, and likewise it was almost universally held that, if the fee was in the public, the legislature could authorize the street to be used for such purpose without compensation to him. Since then the whole subject has undergone deliberate reconsideration, and the weight of recent judicial decision seems to abrogate the distinction and treat the easements of abutting owners as property rights forming part of the estate in the property, except in cases where the public owns the absolute fee of the street and the fee is not limited to street uses proper. In such cases the tendency is still to hold that the legislature, in the absence of special constitutional restraint, may authorize a railroad company to use the street of a city for its roadbed without compensation to the abutter. It might be observed, however, that even in this class of cases there seems to be no just or satisfactory reason why such use of a street, which is specially beneficial to the grantee of the franchise, and causes a special injury to the abutter, should be within the absolute control of the legislature, without regard to the property rights of the abutting owner. Speaking of the nature of public streets and of the rights of the abutter and of the public, Judge Dillon (in section 656a, Mun. Corp.), observes: "The full conception of the true nature of a public street in a city, as respects the rights of the public on the one hand and the rights of the adjoining owner on the other, has been slowly evolved from experience. It has been only at a recent period in our legal history that these two distinct rights have, separately and in their relations to each other, come to be understood and defined with precision. The injustice to the abutting owner arising from the exercise of unrestrained legislative power over streets in cities was such that the abutter necessarily sought legal redress, and the discussion thence ensuing led to a more careful ascertainment of the nature of streets, and of the rights of the adjoining owner in respect thereof. It was seen that he had, in common with the rest of the public, a right of passage. But it was also further seen that he had rights not shared by the public at large, special and peculiar to himself, and which arose out of the very relation of his lot to the street in front of it; and that these rights, whether the bare fee of the street was in the lot owner or

in the city, were rights of property, and, as such, ought to be and were, sacred from legislative invasion as his right to the lot itself." In support of this view of the question he cites, among numerous other cases, *Story v. Railway Co.*, *supra*, which is the leading recent case in New York on this subject. In this case Judge Danforth, after an elaborate and exhaustive review of the authorities, concludes: "In whatever way, therefore, we view the plaintiff's case, the result is the same,—a right of property in the street, with which, until properly appropriated and compensation made, the defendant cannot intermeddle." 2 Dill. Mun. Corp. § 704; *Lahr v. Railway Co.*, 104 N. Y. 268; 10 N. E. Rep. 528; *Railway Co. v. Brown* (Fla.), 1 South Rep. 512; *Mahady v. Railroad Co.*, 91 N. Y. 148; *Railroad Co. v. Reinhackle*, 15 Neb. 279; 18 N. W. Rep. 69; *Railway Co. v. Cumminsville*, 14 Ohio St. 523; *New York El. Ry. Co. v. Fifth Nat. Bank*, 135 U. S. 433; 10 Sup. Ct. Rep. 743; *Railroad v. Schurmeir*, 7 Wall. 272; *Theobold v. Railway Co.*, 66 Miss. 279; 6 South Rep. 230.

In this case the learned court found that the fee of Second South street is in Salt Lake City, in trust for street uses proper; and of this appellant does not complain. Therefore, under the law as applied to this class of cases, plaintiffs have property rights in the street in front of their lots, and the street is not subject to the absolute control of the legislature, nor can the legislature confer such control upon the city council. While the legislature can authorize municipal authorities to permit private corporations to construct and operate street-railway lines upon the street, the authority thus conferred must be exercised within the limits of reasonable discretion, and not so as to materially injure the property of abutters. And this leads to a consideration of the power exercised in this case. Did the city council, in granting the franchise, act within the scope of its authority, and with a reasonable exercise of discretion? Section 340, 1 Comp. Laws Utah, 1888, authorizes Salt Lake City as follows: "To exclusively control, regulate, repair, amend, and clear the streets," etc., "and open, widen, straighten, or vacate streets," etc., "and prevent the incumbering of the streets in any manner, and protect the same from any encroachment and injury." If "to exclusively control the streets" were taken alone and construed literally, it might confer plenary power, and then, if this were not subject to judicial control, the

abutting owners could have no redress, though the injury to their property, caused by acts of the city council, might be very great, but it is also provided to "prevent incumbering of the streets in any manner, and to protect the same from any encroachment and injury;" and this is just what respondents ask for in this case. It is apparent from this section that the legislature intended to confer no power that would injuriously affect the property rights of abutting owners. Subdivision 5, § 389, Id., referring to the powers of Salt Lake City, provides: "To direct and control the location of railroad tracks and depot grounds within the city, and regulate or prohibit the use of locomotive engines thereon, and may require the cars to be used within the inhabited portions thereof to be drawn or propelled by other power than that of steam." This is the statute law of this territory, relied on by counsel for appellant, as applicable to this case. Construed in the light of reason and justice, these enactments do not authorize the city council to grant a railroad franchise if the construction of the road will injure and materially depreciate the value of the property of abutters. When the railroad company has obtained, under the law of eminent domain or otherwise, in cases where the streets are already burdened to the extent that natural justice will allow, a right of way, then the council has the power "to direct and control" the location of the tracks.

According to the evidence, as appears from the record in this case, Second South street is one of the principle business streets running east and west, and at the date of the granting of the franchise to the defendant and of the trial of the cause there were in operation upon that street two railroad tracks, which were located in the centre of the street, with a line of poles between them. There were also many electric light, telegraph, and telephone poles placed in line on each side of the street about four feet from the sidewalk, and on these poles were stretched numerous electric wires. The two tracks in operation were constructed with T rails, which project several inches above the surface of the street, and render the crossing of the tracks with a vehicle difficult and dangerous, the street not being paved. The appellant proposed to construct its track in a similar way on the north side of the present tracks, and to erect additional poles, which would still further

obstruct the ordinary travel, and render the respondents' property less accessible for business purposes. The tracks already upon said street afford ample facilities to run all the cars necessary for public convenience; and the construction of the third track would be a serious impediment to the ordinary mode of travel, as it would not leave sufficient space between the outside rails and the gutter for vehicles to pass each other with safety. Where the track privileges of one company on a city street are sufficient for the business of two or more companies, they should all be required to use them in common. The construction of an additional track, under the circumstances of this case, would be an unnecessary obstruction to and interference with the ordinary use of the street, and a special injury to the property rights of the abutters, and on proper application a court of chancery may grant injunctive relief. In such a case an abutting owner need not stand by and see his property injured without his having any means of redress. *Dill. Mun. Corp.* § 661; *Uline v. Railroad Co.*, 101 N. Y. 98; 4 N. E. Rep. 536; *Ogden City Ry. Co. v. Ogden City*, 7 Utah, 207; 26 Pac. Rep. 288; *Pond v. Railway Co.*, 112 N. Y. 186; 19 N. E. Rep. 487; *Story v. Railway Co.*, *supra*.

Counsel for appellant insist that the several findings of fact to the effect that the construction of the third track would be an unreasonable obstruction of the street, and that the granting of the franchise for that purpose by the city council was unlawful, and an unreasonable exercise of discretion, are not justified by the evidence. There appears to be some conflict in the evidence on this point, but, the learned judge having heard the evidence, and having had the opportunity to observe the manner and bearing of the witnesses while testifying, this court will not disturb the conclusions reached, especially since the record shows them to be fair and logical deductions from the testimony. Where a case is tried in a court sitting as a court of chancery, the findings of fact are conclusive in the appellate court, unless they are so manifestly erroneous as to demonstrate some oversight or mistake. *Wells v. Wells* (Utah), 24 Pac. Rep. 754; *Ullman v. McCormic*, 12 Colo. 553; 21 Pac. Rep. 716; *Doe v. Vallejo*, 29 Cal. 386; *Coryell v. Cain*, 16 Cal. 567; *Coolidge v. Smith*, 129 Mass. 554. The record reveals no material error committed during the conduct of the trial, and we are of the opinion that the act of the city council of Salt

Lake City granting the franchise to the appellant was unlawful as being an unreasonable exercise of discretion, and is therefore of no avail to it.

The judgment is affirmed.

MINER, J., concurs.*

1. Street railroads. Rights of abutting owners. Unreasonable use of street.—The foregoing case illustrates a doctrine in regard to railroads in streets, which we have already had occasion to comment upon. See 6 Am. R. R. & Corp. Rep. 352-356. The case concedes that abutting owners have property rights in streets, whether they own the fee or not, but holds that such rights are subject to the right of the public to use the street for street railway purposes to a *reasonable extent*, but not so as to *materially injure* the abutting property. The language of the court is: "Under the law as applied to this class of cases, plaintiffs have property rights in the street in front of their lots, and the street is not subject to the absolute control of the legislature, nor can the legislature confer such control upon the city council. While the legislature can authorize municipal authorities to permit private corporations to construct and operate street railway lines upon the street, the authority thus conferred must be exercised within the limits of *reasonable discretion*, and not so as to *materially injure* the property of abutters." By this rule the whole subject is relegated to the courts to determine what is a *reasonable discretion* or a *material injury*. Any actual damage to property, or actual interference with the easements of light, air and access, whereby the property is rendered less valuable, would seem to be a *material injury*. When there is a diminution in the value of property, which is capable of being measured in dollars and cents, there would seem to be a *material injury*. The *materiality* of the injury cannot be made a question of *amount*. The court cannot logically say that five per cent. of loss is not material but that ten or twenty per cent. is. If, then, the rule laid down by the court be changed to read, "that the legislature may authorize the use of streets for street railways, provided such use does not cause any diminution in value of the abutting property," the practical result is the same as though it was held that street railroads could not be authorized without compensation to abutting owners. Under the latter rule, if there was no damage, there could be no recovery. Unless the question of *reasonable use* in such cases is to be referred to the criterion of *pecuniary damage*, there does not seem to be any criterion or principle to which it can be referred, but the question is left to the uncontrolled and ever varying judgment of the court, before which the question comes.

2. Electric railways in streets. Right of abutting owner to injunction or damages.—This question is considered at length in note to Raftery v. Central Traction Co., 6 Am. R. R. & Corp. Rep. 287, 327. The principal case affirms in general the proposition that an electric street railway is a legitimate street use, but with some qualifications. The Louisville Bagging Mfg. Co. v. Central Passenger R. Co., (Ky.), 23 S. W. Rep. 592, is another case which supports the same view. The propositions affirmed by this case are the following:

* Reported in 33 Pac. Rep. 229.

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1. The use of a street for an electric railway will not be enjoined because the construction of the track will prevent an abutting owner from loading his drays by standing them at right angles to the sidewalk, such a method obstructing the use of the streets, and being in violation of a city ordinance. 2. The construction and operation of an electric railway by the overhead wire system in a public street does not impose a new and additional burden on the land of the abutting owner and is not so dangerous to those who reside or do business on a public street as to authorize its restraint by injunction.

The suit was for the purpose of enjoining the construction of an electric railway on the street in front of the plaintiff's property, to be operated by means of the trolley system. As the cases on the subject are few and the question important, we quote the views of the court: "As legislative power to authorize construction of a railway upon a public street, and operation of it by even steam, has been distinctly and often held by this court to exist, we see no reason to deny power to likewise authorize construction of such railway to be operated by electricity, for it is well settled that the use of a public street for travel and transportation by means of railway cars falls within the purposes for which streets are established and dedicated; and it is only when other ways of travel and transportation are prevented or unreasonably obstructed that courts can interfere to either enjoin or limit operation of railroads upon a public street. It therefore seems to us the simple inquiry in this case is whether the manner in which the railway under consideration has been or is designed to be constructed and operated is such as to clearly impose a new and additional burden upon the land of plaintiff abutting Walnut street, and, as a consequence, entitling him to previous compensation for the right of way.

"The first ground of complaint by plaintiff is that the railway track constructed in front of its manufacturing establishment will prevent loading and unloading vehicles used in transporting its goods and raw material in the manner heretofore done, which is by backing the wagon or dray up to, and at right angles with, the sidewalk. The answer to that complaint is — First, that such way of loading and unloading necessarily seriously obstructs, not merely operation of every double-track railway, but proper use of a street for all other vehicles; second, there appears to be an ordinance of the general council prohibiting loading and unloading of vehicles in that mode.

"The next ground is that operating an electric railway car upon a public street is dangerous to those who reside or do business thereon. Practical application of electricity as a power to drive machinery or move carriages, as also for illuminating purposes, is of recent date, and it is shown the system best adapted for the purpose, if yet discovered, is by no means a perfect one. The evidence of experts and men having actual experience shows that three different systems for moving railway cars by electricity have been tried in this country, viz., the underground conduit system, storage battery system, and that of the overhead wire; and it fully appears that the two first are as yet so defective or imperfect that, of several hundred electric railways in operation, there are not a dozen to which either system has been applied, all others being run by the overhead wire or trolley system, the same used by the Central Passenger Railway Company. To apply electrical power in that way requires erection at edge of the sidewalk, on each side of a street, of tall poles, about

120 feet apart, and from top of opposite poles is stretched across the street sustaining wires, which hold up the electric wire that is thus suspended over middle of the railway track, and from which, by means of the trolley pole, the electric current is connected with the motor placed under the car. It will be thus seen that the electric wire is not like telegraph, telephone, and electric light wires near to buildings, but suspended over the railway track. It further appears that the electric pressure, measured by volts, required to drive a street-railway car is not so great as to destroy or seriously injure a person or animal coming in direct contact with it; injury, where it is produced, resulting only where a broken or detached telephone or telegraph wire falls on it. The evidence in this case, which need not be considered in detail, shows that, although new and not fully perfected, the trolley system of operating street-railway cars, when properly adjusted and supervised, is not much, if any, more dangerous than horse power, and much less so than steam power, applied in the same way. Moreover, while street railway cars thus operated go at greater speed, are more comfortable, and must in time become a cheaper mode of travel, they can be easier controlled than horse cars, and do not really more obstruct the streets, or interfere unreasonably with business transacted thereon. It therefore seems to us that in view of the benefit and convenience to the public of electric cars thus operated, and comparatively little inconvenience or danger they are to individuals, it would be going beyond the province of a court, and contrary to decided weight of judicial authority, to enjoin or limit their use; especially when a party seeking such remedy so signally, as has the plaintiff in this case, fails to show he has been unreasonably obstructed or hindered in his business, or that his rights have been illegally interfered with."

The position that an electric street railway is a proper use of a street is further sustained by the cases of *Powell v. Macon & I. S. R. Co.* (Ga.), 17 S. E. Rep. 1027, and *Paterson R. Co. v. Grundy* (Ct. of Ch. N. J.), 26 Atl. Rep. 788.

3. Horse railroads in streets—whether abutting owners entitled to compensation.—It is competent for the legislature to authorize the construction of a street railway, operated by horse-power, as distinguished from one operated by steam, in the public streets, without providing any compensation to abutting property holders along the street through which such road may be constructed. This is upon the theory that such roads are not additional burdens upon the soil of the street, but are legitimate uses of the highway, in furtherance of the purposes for which they were originally dedicated. *State ex rel., etc., v. Jacksonville St. R. Co.*, 29 Fla. 590; 10 So. Rep. 590.

4. Power of municipality to grant use of street to street railway.—The authority of a general nature to regulate and control the streets usually granted to municipal bodies is generally deemed sufficient to clothe the municipal body with the right to grant or refuse, or otherwise to regulate, the use of the streets for street railways operated by horse-power. *State ex rel., etc., v. Jacksonville St. R. Co.*, 29 Fla. 590; 10 So. Rep. 590.

5. Cable roads—lowering grade—right abutter to compensation.—Where a petition claimed damages for a permanent injury to plaintiff's property, through the reduction of a graded street for a cable railway, making the property inaccessible except at great expense, an instruction authorizing a recovery of damages caused by such use of the street to the market value of such

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property is proper. The fact that the abutting property was ten feet above the grade of the street does not preclude the owner from recovering damages where the grade is lowered another ten feet. *Brady v. Kansas City Cable R. Co.*, 111 Mo. 958; 19 S. W. Rep. 958.

AHERN V. OREGON TELEPHONE & TELEGRAPH CO.

(Supreme Court of Oregon, June 19, 1893.)

1. **TELEPHONE COMPANIES. INJURY TO TRAVELER ON SIDEWALK BY CONTACT WITH LOOSE TELEPHONE WIRE CHARGED FROM ELECTRIC LIGHT WIRE. NEGLIGENCE. PROXIMATE CAUSE. PLEADING.** In an action against a telephone company for personal injuries, the complaint alleged that plaintiff came in contact with a wire on the sidewalk, which, owing to the darkness, he was unable to see, and that when he took hold of it to remove it from his way the electricity with which it was charged passed into his body. The evidence was that the plaintiff slipped on the sidewalk, and in groping for his hat and packages which had fallen his hand came in contact with the wire, and was "grabbed" by it. Held, that the cause of action was not entirely unproved, so as to cause a fatal variance, within the meaning of Hill's Code, § 98.

2. Where a telephone company has permission from an electric light company to string its wires along the latter's poles when the telephone company wishes to connect a residence where it has no poles, and the telephone company disconnects a residence, and instead of removing the wire, coils it up, and hangs it on an electric light pole, the telephone company is bound to look after the wire; and if it fail to do so, and the electric light company remove the pole, and hang the wire on a telephone pole, where it becomes charged with electricity from an electric light wire, and injures a pedestrian on the sidewalk, the negligence of the telephone company is the proximate cause of the accident.

Chas. H. Carey, for appellant; *James Gleason* and *A. F. Sears*, for respondent.

LORD, C. J.—This is an action to recover damages for a personally injury alleged to have been caused by the negligence of the defendant in permitting its wire to come in contact with an electric wire, whereby it became heavily charged with electricity, and in allowing such wire to hang down so near the ground at the corner of K and Twenty-first streets as to endanger the life and limb of those traveling upon such streets.

The errors assigned relate to the refusal of the trial court to grant a non-suit, and to certain instructions given and refused. Upon the first point the contention is that the evidence does not prove the cause of action alleged, although it may be sufficient to consti-

tute a ground of action, and consequently that the variance is fatal to the plaintiff's recovery. It is no doubt true that the plaintiff must state the facts which constitute his cause of action, and that he cannot state one and prove another. The Code, with all its comprehensive liberality, will not admit, as Sherwood, C. J., said, "a plaintiff to sue for a horse and recover a cow." *Waldhier v. Railroad Co.*, 71 Mo. 518. Such variance is fatal, for the reason that the cause of action is unproved in its entire scope. The inquiry, then, is whether the testimony for the plaintiff establishes a cause of action different from the one alleged. That there is some variation between the evidence and the complaint may be conceded, but it consists only in matter of detail, or as to how the injury occurred. There is no absolute departure in the proof from the original theory of the case. The point to which the variance relates is this: The allegation, in substance, is that the plaintiff was walking along the sidewalk, and came in contact with the wire which, owing to the darkness, he was unable to see; and that he attempted to remove the same from his pathway, and in doing so he caught hold of the wire, and the electricity with which it was impregnated passed into his body, etc.; whereas his testimony shows that he was walking along the sidewalk, and, it being dark, and owing to the rain, the pavement slippery, that he slipped and fell on his elbow, causing his hat to fall off, and some packages to drop out of his hands, and that in groping for his hat and packages his hat came in contact with the wire, which being impregnated with electricity, "grabbed" it and, as he could not let go, he put out his other hand to remove the same, when it "grabbed" that hand, etc. Plainly the variation here is only of detail, or as to the circumstances under which the plaintiff came in contact with the wire and received the injury. The elements of negligence alleged, namely, in permitting its wire to come in contact with the electrical wire, and to hang so near the ground as to endanger life or limb, are present in either aspect of the case, or as much under the testimony as the allegation. Such variance does not present a case where the cause of action is unproved in its entire scope and meaning, within the construction of the Code. Section 98, Hill's Code. Hence there is not a failure of proof, and without such failure the variance is not fatal, or such as would entitle the defendant to a judgment of non-suit.

The principle ground of complaint remains, however, to be considered. This is, was the negligence of the defendant the proximate cause of the injury? There are some other minor questions suggested by way of criticism upon the charge of the court, but the remoteness of its acts, and the intervention of other agencies directly contributing to plaintiff's injury, are relied upon as its chief defense. It was the failure of the court, as indicated by the instructions given and refused, to properly apply the law in this regard that constitutes the main grievance of the defendant. To comprehend the force of this objection, we must first know and understand the facts. The plaintiff is a laboring man, and was employed by the gas company to shovel coal into its furnace. On the day of the accident he quit work after 5 o'clock P. M., and started for his home, but on his way went to market, made some purchases, and went out G street to Twenty-first, and, when passing down that street, near the corner of K, he slipped on the sidewalk, and fell on his elbow, his hat falling off, and the packages which he carried flying out of his hands. After he got up he groped for his packages and hat, when his hand rubbed against a wire, one end of which was hanging down over the sidewalk at the intersection of the streets. His testimony on this point is: "My hand rubbed against this wire, grasping hold of me fearfully. I then took the notion to put up this hand to hit this one away from there. It grabbed that one and held on to it fearfully. I could not let go; it was too strong. I don't know what part of my hand caught hold of it. My fingers rubbed it first. It tore me fearfully, like machinery with about 200 pounds of steam. I was screaming awfully, and finally I saw people around the sidewalk; and this hand after a while dropped from the wire. That must have been the time my toes got burned. It whirled me up in all sorts of shapes. I don't know how I was. When this hand dropped I hung on with it until I was released. After this hand dropped I had no more memory at all. I lost my senses. I don't know what happened after that." Several persons hearing his screams for help, two men ran from J street to his assistance, and one of them slashed at the wire with his knife, and received a severe shock, but did not sever it. After some hesitation, he slashed it again, and succeeded in cutting the wire. The defendant was assisted to his home and put to bed, when it was found

that three toes were badly burned. Afterwards he was taken to the hospital, and one toe was amputated and the others were trimmed off. It was after 6 o'clock, and quite dark, when the accident occurred, and the sidewalk was slippery from recent rain. The defendant could not see the wire, nor did he know that it was hanging down over the street, nor that it was charged with electricity. The wires of the telephone company were strung on K street, running east and west, and the wires of the electric light company and the electric street-railway company were strung along Twenty-first street, running north and south, so that the wires of the defendant were at right angles to the wires of the two electric companies.

The evidence further shows that the defendant had an arrangement with the electric light company by which either might use the poles of the other upon which to string a wire when it had no poles at the place, and only a short distance of wire was to be used; that the defendant used the poles of the electric light company when wiring the residence of a Mr. Bates, at the corner of H and Twenty-first streets, but that some three months before the accident the wire was disconnected from the telephone at his residence, and wrapped around the electric pole, and made fast by tying it on a bracket and winding around the pole and around itself; that such wire had not been used by defendant after it was so disconnected, nor had the company made any inspection of it from that time until the accident; that during this interim the electric company changed its poles and wires along Twenty-first street, and in doing so took down the pole belonging to it upon which the telephone wire was fastened as aforesaid, coiled up the wire, and hung it on a pole belonging to the defendant, near K and Twenty-first streets, where the accident happened; but that the defendant had no knowledge that the electric company had taken down its poles, or taken down its wire, and hung it on the pole as aforesaid. Richard Gerdes testified that he was in the employ of the electric light company, and that on the night of the accident he received a message by telephone that a man had been hurt by an electric light wire; that he went at once to the place where the accident occurred, and found the wire hanging on the pole; that he cut it above the coil; that it was heavily charged with elec-

tricity by contact with a wire belonging either to the electric street-railway or the electric light company ; that it must have been the wire of one or the other that charged it with electricity, as there was no other heavily charged wire in that vicinity. The evidence further shows that the day before the accident the wire was hanging in the form of a coil on a stick at the side of the telephone pole, and that the bottom of it was two or three feet from the ground ; that it was heavily charged with electricity, and that one witness, who touched it with a wire, was thrown to the ground from the shock.

Among other things, the court, in substance, instructed the jury that the question here submitted is "whether it was negligence or not to leave a wire along a public thoroughfare, where it might be found in the way of pedestrians, or where it might be liable to be handled or interfered with by boys or by irresponsible persons." That it was for them to determine from the evidence "whether or not there was a proper inspection made of these wires, so as to know what their condition was, and to ascertain whether anybody had been interfering with them, making them more dangerous than they otherwise would be." That "the fact that this company used the poles of another company, and the fact that other electric companies had wires upon the same street, does not detract at all from the strict requirements which should be made of the defendant company. Unless it had loaned its wire to the electrical company, or the electrical railway company, and placed them under the control of that company, it could not be absolved from the duty of looking after them and ascertaining and knowing what their condition was, and of anticipating and foreseeing that might happen in connection with them ; and that, unless you should find from the evidence that this defendant had turned over the use and control of its wires to these other companies on whose pole this wire was suspended, you have no right to say that those companies were liable, and not this company, if this company was guilty of any negligence. Unless this company was negligent, there could be no recovery on the part of the plaintiff. If you find that it was not guilty of any negligence, then your verdict should be for the defendant." The counsel for the defendant requested the court to instruct the jury as follows: "If the jury finds that the defendant was not negligent in leaving its wire attached to the pole near Mr. Bates'

house, as it did leave it, and that the wire was not dangerous as left by it, and could not and did not become dangerous except by the act or neglect of some other person or company, the defendant is not liable ; " but the court refused to charge as requested, but gave it with the following modification : " I give you that in connection with the general instruction which I gave you that the defendant must have parted with the control of its wires in order to be exonerated by the reason of the negligent act of some other person." The defendant also requested the court to charge that " it is claimed by the defendant that it placed its wires in a safe and secure position, and that it did not become dangerous except by the acts and omissions of others, without its knowledge or consent. If you find this is true, the defendant is not liable, unless the intervening acts or omissions of such other persons should have been contemplated and guarded against by the defendant as consequences likely to follow, and which might have been reasonably anticipated." And again : " If it was not negligent in leaving the wire as it did, it is not liable, unless it could have reasonably foreseen that some one would take down the wire, and place it where it injured the plaintiff, and that it might come in contact with some other electric wire that was charged with a current of electricity that would make it dangerous." And again : " Even if the defendant had left its wire coiled up or hanging over the sidewalk, so that pedestrians might come in contact with it, it would not be liable for damages to the plaintiff for injury sustained by an electric shock from the wire unless the fact that the wire left there was the immediate or proximate cause of the injury, the wire not by itself being dangerously charged with electricity, and becoming so charged only by intermediate circumstances, namely, that of interfering with or crossing some heavily charged wire," etc. The court refused to so instruct the jury, and to its rulings thereon the defendant duly excepted.

It appears from the instructions that the theory of the law as applied to the facts by the trial court was that it is negligence to allow a wire, which, from its environment, is liable to become charged with electricity, to hang over the street at such a height as to obstruct and endanger ordinary travel. That it was the duty of the defendant, owing to the location of its wire and the use of the poles of the electric light company, to look after it, and see

that it was in proper condition, and that, when the wire was disconnected from the Bates residence, if, instead of taking down the wire, the company chose to hang it on the electric pole, the duty still devolved upon it to take care of such wire, and that this was a continuing duty, from which it would not be absolved unless it had parted from the control of its wire to the electric companies. This requirement imposed upon the defendant the obligation of looking after and ascertaining the condition of its wire and of anticipating or foreseeing results which were likely to happen by reason of its connection or location as to the electric wires so as to avoid liability to danger arising therefrom. In this view of the law, the taking up of the pole by the electric light company and hanging the defendant's wire upon its pole at the intersection of K and Twenty-first streets would not authorize the jury to find that the electric companies were liable, and not the defendant, if it was negligent in not removing its wire when it ceased to use it at the Bates residence. It is earnestly insisted by counsel that this view of the law is a wrong conception of the defendant's duty, for the reason that it makes the company liable for the wrongful acts of third persons in taking down the wire and hanging it on the pole where it became charged with electricity, which, he claims, are the responsible causes of the injury. This is based on the assumption that there intervened between the negligence of the defendant, if any there was, and the injury to the plaintiff, an independent, adequate cause of the injury, namely, the wrongful act of the electric company, which was the proximate cause of the injury. What is the proximate cause of the injury is ordinarily a question for the jury. It is only when the facts are undisputed that it becomes a question for the court. Wherever, therefore, there is any doubt, the question of proximate cause should be submitted to a jury to be decided as a matter of fact according to the circumstances of the case. To warrant a jury in finding that negligence is the proximate cause of the injury it must appear that the injury was the natural and probable consequence of the negligence, and that it ought to have been foreseen in the light of the attending circumstances. *Railway Co. v. Kellogg*, 94 U. S. 475. The question, therefore, whether the stretching of the defendant's wire on the electric poles instead of its own poles, and whether the omission of the defendant to remove the same when it ceased to use it

at the Bates residence, was negligence, and, if it was, whether the intervening act of the electric company and its consequences were such as could have been reasonably anticipated and guarded against by the defendant, was for the jury to determine in the light of the facts and circumstances. The record discloses that the electric light company gave the defendant permission to use its poles upon which to string its wire when the defendant needed them to connect its wire to a residence where it had no poles. When the defendant disconnected its wire from the telephone at Bates' residence it had no longer any need to use the electric poles, and the permission or license given to use them ceased, or was at an end, and necessarily the defendant ought to have removed its wire from the electric poles; and if it did not do so, but coiled and hung it on one of them, where it had no right to be, the defendant was bound to look after it, and to expect, if it failed to do so, that the electric company would remove it when such wire incommoded that company, or its business required the removal of its poles, as did happen. The jury found that the stretching of the wire upon the electric poles was dangerous, and that the omission of the defendant to remove it, when it disconnected the same from the Bates residence, and ceased to use it was negligence, and that the intervening act of the electric company and its consequences could have been foreseen as likely to happen, or possibly to follow, from leaving the wire coiled and hung upon the electric pole near the Bates residence, and necessarily that the defendant was responsible for its wire being coiled and hung upon its own pole at the intersection of K and Twenty-first streets. This responsibility is based on the principle that if the defendant, instead of removing its wire, chose to hang it upon the electric pole, where it had no right to be, it was bound to look after it, and that, if the defendant had done so, it would have discovered the removal of the same, and its condition, so that the injury might have been avoided, and consequently the company must be taken to have foreseen as likely to happen, or possibly to follow, the consequences which resulted from its omission to remove the wire when it was disconnected from the telephone at the Bates residence. This is in accordance with the rule that a person guilty of negligence or an omission of duty "should be held responsible for all the consequences which a prudent and experienced man, fully ac-

quainted with all the circumstances which in fact existed, whether they could have been ascertained by reasonable diligence or not, would have thought at the time of the negligent act reasonably possible to follow if they had been suggested to his mind." Shear. & R. Neg. § 29. But this phase of the case is met with the argument that the telephone wire itself is not dangerous, and that the main or efficient cause of the injury was the electric current from the wires of the electric companies, with the production of which the defendant had nothing to do. In other words, that, if the defendant was negligent, it was the dangerous force of electricity which intervened, and with the production of which the plaintiff had nothing to do, that communicated the injury to plaintiff, and therefore it was the proximate cause of the injury. It is no doubt true that where there is negligence, and injury following it, and there is also an intermediate cause, disconnected from the negligence, and the operation of this cause produces the injury, the person guilty of the negligence cannot be held responsible for the injury. The inquiry must always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury. *Railway Co. v. Kellogg, supra*. If the intervening cause and its probable consequence be such as could reasonably have been anticipated by the original wrong doer, the causal connection between the wrongful act and the injury is not broken, and the defendant is liable for the injury. In *Sewing Mach. Co. v. Richter*, 2 Ind. App. 334, 28 N. E. Rep. 446, it is said: "Intervening agencies sometimes interrupt the current of responsible connection between negligent acts and injuries, but as a rule these agencies, in order to accomplish such result, must entirely supersede the original culpable act, and be in themselves responsible for the injury, and must be of such a character that they could not have been foreseen or anticipated by the original wrongdoer. If it required both agencies to produce the result, or if both contributed thereto as concurrent forces, the presence and assistance of one will not exculpate the other, because it would still be an efficient cause of the injury." The intermediate cause must supersede the original wrongful act or omission, and be sufficient of itself to stand as the cause of plaintiff's injury, to relieve the original wrongdoer from liability. "One of the most valuable of the criteria furnished us by the authorities," Mr. Justice Miller said, "is

to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened of itself, sufficient as the cause of the misfortune, the other must be considered as too remote." Insurance Co. v. Tweed, 7 Wall. 52. There is no claim that the wires of the companies transmitting electrical power were not in their proper position, or that the companies were negligent in the use of their wires. We must take it, upon the facts as disclosed by this record, that their wires were where they had a right to be, and were not an obstruction, endangering the life or limb of any one traveling along the street. It was the telephone wire, suspended on a pole, as shown by the evidence, that furnished the means by which the currents of electricity passing over the electric companies' wires were diverted and conducted so close to the ground as to render passage along the public thoroughfare exceedingly dangerous. As a consequence, it was the defendant's wire so hanging upon the pole that furnished the means by which the electrical current was communicated to and injured the plaintiff. It is true that the electrical current was a new power which intervened, and with the production of which the defendant had nothing to do, but it was harmless, or could not have been communicated to the plaintiff, but for the suspended wire of the defendant. As an intermediate cause it was connected with the primary fault, and not self-operating, and therefore is not sufficient itself to stand as the cause of plaintiff's injury. The language of Mr. Justice Bruce clearly illustrates this point: "To say that the agency of the telephone wire in the production of the injury was inferior to that of the electric current, which was the main cause, is not satisfactory. It is, in fact, to admit that the company's displaced wire furnished the means by which the dangerous force was communicated to and injured the defendant in error. True it was a new force or power which intervened, with the production of which the telephone company had nothing to do, but upon this point, in Insurance Co. v. Tweed, 7 Wall. 52, the court says: 'If a new force or power has intervened, of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote.' The new force or power here would have been harmless but for the displaced wire, and the fact that the wire took on a new force, with the creation of which the company was not responsible, yet it con-

tributed no less directly to the injury on that account." Telephone Co. v. Robinson, 50 Fed. Rep. 813. It thus appears that the defendant's negligence was the primary and proximate cause of the injury. In view of this result the other errors assigned are of little importance, and not such as would authorize the reversal of the case. It results that the judgment must be affirmed.*

Injury to traveler on highway by electricity from electric wires negligently allowed to encumber the street.—The question of liability in such cases is passed upon in *United Electric Ry. Co. v. Shelton*, 3 Am. R. R. & Corp. Rep. 577, and *Clements v. Louisiana Electric Light Co.*, 6 Am. R. R. & Corp. Rep. 511, and cases cited in note to the latter case.

GRATIOT V. MISSOURI PAC. RY. CO.

(Supreme Court of Missouri, *in banc*, March 20, 1893.)

1. **RAILROAD COMPANIES. ACCIDENT AT CROSSING. CONTRIBUTORY NEGLIGENCE.** In an action against a railroad company for injuries at a railroad crossing in a city, it appeared that plaintiff, on driving within seven or eight feet of the track, stopped his horse, and stood up in his buggy, where he had a perfect view of the tracks for a distance of 1,200 or 1,400 feet; that he knew it was about the time for a certain mail train to pass; that he saw an engine about 800 yards away, which he supposed was a switch engine at certain smelting works; that he heard a whistle, which he took to be at a station 1,200 yards away; that he then sat down, and started across the tracks, when his horse was struck by the engine seen by him, which was attached to such mail train; and that the train was running at a rate of speed eight or ten times faster than was permitted by the ordinances of such city. The evidence as to whether the whistle was sounded and the bell rung for the crossing was conflicting. Held, that the questions of defendant's negligence and of plaintiff's contributory negligence were for the jury, and instructions asked by defendant in the nature of a demurrer to the evidence were properly refused.

2. In such action the court charged that it was plaintiff's duty to exercise that degree of care that an ordinarily careful and prudent person, under like circumstances, would have exercised, and a failure to exercise such degree of care would render him guilty of contributory negligence; and that, if he approached the crossing without paying any attention to his own safety, but trusted to the obligations of defendant to warn him of an approaching train, and was injured by reason thereof, they should find for defendant. Held, that such instructions fairly submitted the issue as to plaintiff's contributory negligence to the jury, and instructions asked requiring a higher degree of care were properly refused.

3. **POWER OF CITY TO LIMIT SPEED OF RAILROAD TRAINS.** A city has the power, as a police regulation, to limit the speed of railroad trains within its

* Reported in 33 Pac. Rep. 408.

limits by ordinance, so long as the same is not unreasonable; and an ordinance limiting the speed of such trains to six miles per hour is both reasonable and humane.

4. **EXCESSIVE DAMAGES.** In such action it appeared that plaintiff was a physician, sixty years old, and earned about \$2,500 a year; that his nose and three ribs were broken, and his spine and hip were injured; that he is permanently paralyzed on one side; that some of his teeth were broken and knocked out; and that he is an invalid for life, so that his earnings are much reduced. Held, that a verdict for \$10,175 was not excessive.

ACTION by Charles B. Gratiot against the Missouri Pacific Railway Company to recover damages for injuries received at a railroad crossing. A judgment entered on the verdict of a jury in favor of plaintiff was affirmed in department 2 on appeal (16 S. W. Rep. 384), and on rehearing (19 S. W. Rep. 31). Subsequently a motion to set aside the order overruling the motion for a rehearing was sustained, and a rehearing granted, and the case transferred to the court *in banc*.

The plaintiff a physician, aged sixty years, brought this action in the circuit court for the city of St. Louis, to recover damages on account of injuries sustained in a collision with a passenger train on defendants railway, at a point where it is crossed by a highway commonly known as "Campbell's Road." The accident occurred within the limits of the city of St. Louis, at a point distant from the Union Depot a little over five and one-half miles. From the Union depot along the defendant's railway to the western boundary of the city limits is about eight miles. By his petition, the respondent relied upon the three following grounds for a recovery: First. The failure to ring the bell of the engine eighty rods before reaching the crossing, as required by statute. Second. Moving the train at a speed exceeding six miles per hour, the limitation imposed by ordinance of the city of St. Louis. Third. A failure to constantly sound the bell, as required by ordinance, when trains are moving. The answer was a general denial, with the plea of contributory negligence on the part of plaintiff.

With respect of the details of the respondent's conduct immediately preceding and at the time of the casualty he is the only witness. The prominent points of reference in the testimony are "the bridge," Howard's station, the smelting works, Cheltenham, and Campbell's road. From the Union Depot to Cheltenham it

is five and one-quarter miles; Campbell's road crossing is about 150 yards west of Cheltenham; Howard's station is one-half mile east of Cheltenham; the bridge is 200 or 300 yards east of Howard's; and the smelting works are a little west of Howard's, and between Howard's and Cheltenham. The defendant's railway is a double track between the Union Depot and Kirkwood, a suburban town, fourteen miles distant; and the trains, both freight and passenger, upon it, are frequent in both directions. The north track, regarding it as running east and west, is used by the west-bound trains, and the south track by the east-bound.

Dr. Gratiot had lived and practiced medicine at Cheltenham for forty-five years, was perfectly familiar with the locality and its surroundings, and with the schedules of time of defendant's trains, and knew from daily observation the rate of speed at which the train that occasioned the injury ran over that part of the road passing through Cheltenham and vicinity. He was struck by the through express train, which leaves the Union Depot at nine o'clock in the morning, and which, he, says, was due at Cheltenham at about 9:10; that on the morning he received his injuries, and before venturing across the railroad track at Campbell's road, at the time he was hurt, he had gone quite up to the crossing, and, because he was unadvised whether the express train had passed along, he would not venture over, although he at that time saw no evidence of an approaching train from a perfect view of the tracks in both directions. Instead, however, of crossing at that time, he went to the house of a lady friend for the purpose of ascertaining the exact time of the day, so that he might know positively whether the express train had passed along or not. He ascertained the time, and, after waiting a little while, proceeded down to the crossing, along the Manchester road, which runs, in that vicinity, parallel with and just north of the defendant's railway for a mile and a half, until he got within seven or eight feet of the railroad track, where he stopped, having a perfect view of the tracks in both directions, and especially to the east, for a distance of 1,200 or 1,400 yards, as far as the bridge immediately east of Howard's; raised himself up in his buggy and looked to the east, where he saw an engine facing in his direction. He also heard a whistle, which he took to be a whistle at the bridge for Howard's station. He then immediately resumed his seat, turned his horse to effect a crossing,

saw a waver on his glasses, attempted to pull his horse, whose front feet were then nearly on the north rail of the north track, back; was immediately struck and injured. After seeing the engine as he supposes, at a distance of 800 or 1,000 yards, and after hearing the whistle, he took no further notice, but immediately attempted a crossing, as he said, supposing that the engine which he saw was a switch engine at the smelting works and the whistle which he heard was a whistle at the bridge east of the smelting works. He gave no expression of opinion whether the glimpse or sleight view which he had of the engine, supposed by him to be a switch engine at the smelting works, enabled him to judge whether the engine was moving or standing still. It is conceded that the train by which plaintiff was injured was moving at a speed of thirty-five or forty miles an hour, though some of the witnesses for the plaintiff gave it as their opinion that the train was moving much faster.

At the close of the plaintiff's evidence, as well as all of the evidence, the defendant prayed instructions in the nature of a demurrer to the evidence, which were refused. It further prayed the following instructions, which the court refused, and defendant excepted: "(3) The court instructs the jury that if they believe from the evidence that the plaintiff could have avoided the collision which resulted in his injury by stopping his horse and buggy to look and listen carefully and constantly for an engine or train, both up and down defendant's track, before attempting to drive over the said track, and failed to do so, they must find a verdict for the defendant. (4) If the jury believe from the evidence in this case that plaintiff attempted to drive his horse and buggy onto defendant's tracks at the crossing on Campbell's road without first having stopped said horse and buggy to look and listen carefully and constantly, both up and down said track, for an approaching engine and train, and was thereby injured, they must find a verdict for the defendant, even though they find from the evidence that defendant's servants in charge of the engine were also at the same time guilty of negligence. (5) The court instructs the jury that it was the duty of the plaintiff, at the time and place in question, while he was approaching on Campbell's road to the tracks of the defendant's railroad, crossing said road, to stop his horse and buggy, and to look and listen carefully and constantly both up and down said tracks, for an approaching en-

gine or train, before attempting to drive across said tracks, and a failure on his part so to do would constitute in law contributory negligence, which would preclude a recovery in this action for damages resulting therefrom in whole or in part. (6) If the jury find from the evidence that plaintiff, at or about the time mentioned in the petition, to wit, the 28th day of October, 1887, was approaching on what is commonly called 'Campbell's Road' from the north, a point on said road where the same is crossed by the tracks of defendant, and that, as he came near to said crossing with his horse and buggy, he did not constantly look both ways for an engine or train on defendant's tracks, and was injured in consequence thereof, then he cannot recover in this case; and if the jury further find that on account of the topography of the ground on the north of and near to the tracks of defendant the view of defendant's tracks east of the point of the accident was and is obstructed, then it was the duty of plaintiff, at the time and place of the accident, as he approached said crossing with his horse and buggy, to use increased care and prudence in attempting to cross the defendant's tracks at said point, and to stop, look, and listen, both up and down the tracks, for an approaching engine or train, and not to attempt to cross the said tracks until he had ascertained, by looking and listening, whether an engine or train was approaching said crossing at the time; and, if they find from the evidence that plaintiff failed so to do, and was injured in consequence of such failure, or that his injury was in any degree caused by such failure on his part, then he cannot recover. (7) If the jury find from the evidence that plaintiff, in approaching the alleged crossing on Campbell's road with his horse and buggy, at a distance from the tracks of defendant of ten or fifteen feet, looked east along the road, and saw an engine thereon at a distance from him of about a thousand yards, which he supposed to be an engine engaged in switching cars at Howard's station, and paid no further attention to ascertain whether such engine was approaching him or the point on defendant's tracks which he was about to cross, and did not look constantly in that direction after seeing said engine, as above stated, or listen for the same, and his horse and buggy were struck by said engine while he was attempting to cross the defendant's tracks at said crossing, and the said horse and buggy were

damaged, and himself injured, in consequence of such collision, then plaintiff cannot recover in this action."

The court then gave of its own motion, the following instructions: "(1) It appears from the undisputed evidence in this case that at the time of the collision in question the defendant's train was running at a greater rate of speed than six miles an hour, and that it was within the limits of the city of St. Louis, not on a track along the river bank between Arsenal street and Elwood street; and you are instructed that the act of running its train at a greater rate of speed than six miles an hour within the limits of aforesaid was an act of negligence on the part of defendant. (2) It was the duty of defendant's servants in charge of the engine and cars, while running or moving within the limits of said city, to cause the bell on the engine to be constantly sounded; and if you believe from the evidence that the bell on the engine of the train in question was not constantly sounded while said train was running or moving within said limits,—then you should find that the defendant was guilty of negligence in that respect also. (3) It was the duty of defendant, in the running and handling of said train, to have exercised that degree of care and prudence which an ordinarily careful and prudent person engaged in like business would have exercised, and a failure to exercise such a degree of care and prudence would be negligence. (4) And, on the other hand, it was the duty of the plaintiff in crossing, or attempting to cross the defendant's railroad track, to have exercised that degree of care and prudence that an ordinarily careful and prudent person, under like circumstances, would have exercised, and a failure to exercise such a degree of care and prudence would render him guilty of negligence. (5) If, therefore, you believe from the evidence that the collision alleged in the plaintiff's petition occurred while the plaintiff was himself exercising that degree of care and prudence that an ordinarily careful and prudent person, under like circumstances, would have exercised, and that the collision was caused by negligence of the defendant or its servants, as the term 'negligence' is explained in either the 1st, 2nd, or 3d of the foregoing instructions, then your verdict should be for the plaintiff. (6) But, although the defendant was guilty of negligence in running its train at a greater rate of speed than six miles an hour, and although you may believe from the evidence that the defendant

was also guilty of negligence, as that term is explained in either the second or third of the foregoing instructions, and although you may believe from the evidence that such negligence of the defendant contributed to cause the collision in question, yet if you also, believe from the evidence that the plaintiff was also guilty of negligence, as that term is explained in the fourth instruction foregoing, and that such negligence of the plaintiff directly contributed to cause said collision,—that is to say, if you believe from the evidence that said collision was the result, not of the negligence of the defendant alone, but of the joint negligence of both plaintiff and defendant,—then the plaintiff is not entitled to recover, and your verdict should be for the defendant.” “(9) If the jury find in favor of the plaintiff under the evidence and instructions in the case, they should assess his damages at such sum as the jury may believe from the evidence will be a fair compensation to him. First, for any damage to his property; second, for any pain of body or mind; third, for any loss of earnings; fourth, for any physical disability or disfigurement which the plaintiff has sustained or will hereafter sustain by reason of said injuries and directly caused thereby, not exceeding the amount sued for.” To which action of the court in giving said instruction, defendant at the time duly excepted. The court then, at the instance of defendant, gave to the jury the following instructions: “(7) If the jury find from the evidence that the plaintiff approached the railway crossing with his horse and buggy, without paying any attention to his own safety, but trusted to the obligations imposed upon the railway company to warn him of an approaching engine and train, and was injured by reason of his failure to so pay attention, they will find a verdict for the defendant. (8) The court instructs the jury that there is no sufficient evidence introduced by plaintiff showing that the alleged paralysis of his leg will be permanent, and, in the event that they find a verdict for him, they will allow him nothing by way of damages as for a permanent paralysis of the leg.” The jury thereupon returned a verdict for the plaintiff for \$10,175. Defendant, within four days after verdict, filed its motion for a new trial, which, being overruled, defendant appealed.

H. S. Priest, for appellant; *Davis & Davis*, *A. R. Taylor* and *Jas. P. Maginn*, for respondent.

BURGESS, J. (after stating the facts)—Defendant's first contention is that the court committed error in refusing to instruct the jury that, under all the evidence, plaintiff could not recover, and that the verdict must be for defendant. There is perhaps no question better settled in this state than that the running of a train in violation of and in excess of the number of miles per hour prescribed by a city ordinance is negligence *per se*. *Dahlstrom v. Railway Co.* (Mo. Sup.), 18 S. W. Rep. 922; *Schlereth v. Railway Co.*, 19 S. W. Rep. 1134 (decided at this term, and not yet officially reported); *Id.*, 96 Mo. 509, 10 S. W. Rep. 66; *Keim v. Railroad, etc., Co.*, 90 Mo. 314; 2 S. W. Rep. 427; *Karle v. Railroad Co.*, 55 Mo. 476; *Eswin v. Railway Co.*, 96 Mo. 290; 9 S. W. Rep. 577; *Kellny v. Railway Co.*, 101 Mo. 67; 13 S. W. Rep. 806; *Murray v. Railway Co.*, 101 Mo. 236; 13 S. W. Rep. 817. See, also, *Thomp. Neg.* 588; *Johnson v. Railroad Co.*, 20 N. Y. 65; and *Railroad Co. v. Dunn*, 78 Ill. 197. There is no question but that the injury sued for was occasioned by one of defendants trains, which was at the time running in excess of the limit prescribed by the city ordinance; and if, by reason of such excessive speed, or by reason of its failure to constantly sound the bell on the engine while in the city limits, plaintiff was run over or against, and injured, without negligence on his part contributing directly thereto, he was entitled to recover. The evidence in regard to ringing the bell and sounding the whistle was very contradictory. Those in control of the train testified that the bell was being constantly rung, while several other disinterested witnesses testified to the contrary. Miss Binkenkamp, a witness for the defendant, who was about forty feet from the crossing at which the plaintiff was hurt, testified that when the plaintiff rose up in his buggy to look before crossing the track, the train was about 300 or 400 yards distant, and that when he attempted to cross the train was 200 or 300 feet from him, and that instant she called to a gentleman at the mill that plaintiff was going to get hurt, and, as she looked around, she saw the collision. She also testified on her cross-examination that the bell was not ringing, because she was looking at it. If the bell was not ringing, this was also negligence *per se*. Authorities cited, *supra*. Although plaintiff saw the train, and afterwards, and before it struck him, attempted to cross the railroad track, yet, if he did not know what train it was

and that it was usually run at a rate of speed prohibited by ordinance, he had the right to presume that it was running within the prescribed time, at a rate not exceeding six miles per hour, and, if such had been the case, and he would have had time to have gotten across the railroad track in safety before it could have moved to where the collision occurred from where it then was, or he could have gotten his horse out of the way of the train in time to have avoided the collision, he was not guilty of such contributory negligence as would have justified the court in taking the case from the jury. Plaintiff stated as a witness that he saw the train about 800 yards east of him, near the smelting works between Howard's station and Sublette avenue, and supposed that it was a locomotive on the smelting works switch. He did not know that it was the train that caused the injury, and, even if he did, he had the right to rely upon the observance, by persons in whose control it was, of the ordinance of the city in regard to the rate of speed at which it should run. Every reasonable presumption is to be indulged in the observance of the law by all persons, whether private persons or corporations. *Jenning v. Railway Co.*, 99 Mo. 394; 11 S. W. Rep. 999; *Kelly v. Railway and Transit Co.*, 95 Mo. 279; 8 S. W. Rep. 420; *Kellny v. Railway Co.*, 101 Mo. 67; 13 S. W. Rep. 806; *Eswin v. Railway Co.*, *supra*. The cases relied on by defendant, to wit: *Railroad Co. v. Webb* (Ala.), 8 South Rep. 518; *Railroad Co. v. Mali* (Md.) 5 Atl. Rep. 87; *Zimmerman v. Railroad Co.*, 71 Mo. 476; *Taylor v. Railway Co.*, 86 Mo. 457; *Kelley v. Railroad Co.*, 75 Mo. 138; and *Fox v. Railway Co.*, 85 Mo. 679,—are all cases where the injured party went on the track within a short distance of an approaching train, and without any precaution whatever in either listening or looking; while in the case at bar, plaintiff saw the train that collided with him, and, if it had not been moving in excess of the rate of speed fixed by the ordinance, or if the bell on the engine had been continuously sounded, the injury might not have occurred. The cases of *Railroad Co. v. Houston*, 95 U. S. 697; *Schofield v. Railway Co.*, 114 U. S. 615; 5 Sup. Ct. Rep. 1125; *Railroad Co. v. Hobbs*, 19 Amer. & Eng. R. Cas. 337; *Mynning v. Railroad Co.*, (Mich.) 31 N. W. Rep. 147; *Harris v. Railroad Co.* (Minn.) 33 N. W. Rep. 12; *Brown v. Railroad Co.*, 22 Minn. 165; *Railroad Co. v. Mali*, (Md.) 5 Atl. Rep. 87; *State v. Baltimore & P. R. Co.*, 58 Md. 482; *Hixson v. Rail-*

road Co., 80 Mo. 335; Turner v. Railroad Co., 74 Mo. 603; Henze v. Railroad Co., 71 Mo. 636; Railroad Co. v. Clark, 73 Ind. 168; Tolman v. Railroad Co., 98 N. Y. 198; Railway Co. v. Adams, 33 Kan. 427; 6 Pac. Rep. 529; Schaefer v. Railway Co., 62 Iowa, 624; 17 N. W. Rep. 893; Pence v. Railway Co., 63 Iowa, 746; 19 N. W. Rep. 785; Tully v. Railroad Co., 134 Mass. 499; Powell v. Railway Co., 76 Mo. 80; Abbett v. Railway Co., 30 Minn. 482; 16 N. W. Rep. 266; Haas v. Railroad Co., 47 Mich. 401; 11 N. W. Rep. 216; Kelly v. Railroad Co., (Pa. Sup.) 8 Atl. Rep. 856; Merkle v. Railroad Co., 49 N. J. Law, 473; 9 Atl. Rep. 680; Railway Co. v. Richards, 59 Tex. 373; Pennsylvania Co. v. Morel, 40 Ohio St. 338; Rogstad v. Railway Co., 31 Minn. 208; 17 N. W. Rep. 287; Flemming v. Railroad Co., 49 Cal. 253; Railway Co. v. Elliott, 28 Ohio St. 340; Woodard v. Railroad Co., 106 N. Y. 369; 13 N. E. Rep. 424; Yancey v. Railway Co., 93 Mo. 433; 6 S. W. Rep. 272; Butts v. Railway Co., 98 Mo. 273; 11 S. W. Rep. 754,—are all cases where the accident happened by reason of the injured party walking on the railroad track, or at some railroad crossing in the country; or if in a city, where there was no ordinance or law regulating the speed of trains; and where the injured party failed to look and listen before attempting to cross the track, and was therefore guilty of negligence contributing directly to the injury; and are not considered as controlling authority in the case at hand. The degree of care and caution required of plaintiff before and at the time of attempting to cross the railroad track was fairly presented by the fourth instruction given by the court of its own motion, and No. 7 at the request of defendant.

Negligence is ordinarily a question for the jury. It is always so when the evidence on material points is conflicting, or where, the facts being undisputed, different minds might reasonably draw different conclusions from them. Negligence cannot be conclusively established, as a matter of law, upon a state of facts on which fair-minded men of ordinary intelligence may differ as to the inferences to be drawn from it; and when the question of negligence arises upon even a conceded state of facts from which reasonable men might arrive at different conclusions, it must be submitted to the jury; and, if the inferences to be drawn from the evidence are not certain or incontrovertible, the question of negligence cannot be

passed upon by the court. *Tabler v. Railroad Co.*, 93 Mo. 79; 5 S. W. Rep. 810; *Norton v. Ittner*, 56 Mo. 351; *Huhn v. Railway Co.*, 92 Mo. 440; 4 S. W. Rep. 937; *Mauerman v. Siemerts*, 71 Mo. 101; *Nagel v. Railway Co.*, 75 Mo. 653; *Keim v. Transit Co.*, 90 Mo. 314; 2 S. W. Rep. 427. In considering the instructions in the nature of a demurrer to the evidence, every reasonable intendment in favor of plaintiff to be drawn from the evidence offered by him must be indulged, and the evidence introduced in his behalf regarded as absolutely true; and, when this shall have been done, it seems clear that the court did right in submitting the case to the jury, as there was ample evidence to justify that course. The law is that it is the duty of all persons, before attempting to cross a railroad track at a public crossing, to be on the alert, and look and listen for approaching trains, so as to avoid injury; and if, in failing to do so, an injury occurs by reason of such negligence, recklessness, or carelessness contributing directly thereto, there can be no recovery unless the person in charge of the train either saw or might have seen by the exercise of due care and caution, the perilous position of such person in time to have avoided the injury. Yet where the evidence is conflicting in regard to such matters, as in the case at bar, the issues should always be submitted to a jury. *Nagel v. Railway Co.*, *supra*, and authorities cited. The court in a very clear and well-prepared set of instructions submitted all of the issues to the jury with absolute fairness to both parties, and defendant's objections thereto are not tenable. Taken as a whole they seem to be unobjectionable. The city had the power and authority under its charter, as a police regulation, to limit the movements of railroad trains by ordinance to not exceeding a certain number of miles per hour within its corporate limits, for the purpose of protecting persons and property; and while it has been the practice of this court to declare city ordinances void when in its judgment they were unreasonable, as well held in the case of *Corrigan v. Gage*, 68 Mo. 541, yet it has also been held that a clear case should be made out to authorize an interference by the court on the ground of unreasonableness. *City of St. Louis v. Weber*, 44 Mo. 547. The ordinance under consideration is not only reasonable, but is to be commended for its humane character and objects in the protection of life and property.

The remaining contention is that the damages were excessive, and the evident result of passion and prejudice, and for that reason, if for no other, the case should be reversed. The trial occurred about one year after the accident, and shows that the plaintiff is disfigured for life; his nose broken; that he is paralyzed permanently on one side, the left side of his face; his teeth broken and knocked out; three of his ribs broken on the left side; his spine and left hip injured; constant uneasiness in the left side; and that his practice, which was worth on an average of about \$2,500 per annum, has been much less since his injury, because of his inability to attend to it in consequence of his injury; and that his injuries are permanent, and he an invalid for life. We could not say, under the circumstances, that the damages are excessive. *Porter v. Railroad Co.*, 71 Mo. 66; *Dougherty v. Railroad Co.*, 97 Mo. 647; 11 S. W. Rep. 251; *Griffith v. Railroad Co.*, 98 Mo. 168; 11 S. W. Rep. 559. In this last case the court says: "The damages assessed are large, but, in the absence of any evidence of passion, prejudice, favor, or corruption of the jury, we cannot undertake to presume their existence from the amount of the verdict alone, and, unless we could, there is no ground for reversal for excessive damages." *Sheey v. Railway Co.*, 94 Mo. 574; 7 S. W. Rep. 579.

As there is no error in giving or refusing instructions, the judgment is affirmed.

BRACE, BARCLAY, and MACFARLANE, JJ., concur. BLACK, C. J. concurs in a separate opinion, except as to the damages assessed which he thinks excessive. GANTT, J. concurs except as to the damages assessed, which he thinks excessive, and that for that reason the cause ought to be reversed, and remanded for a new trial. SHERWOOD, J., dissents.

BARCLAY, J.—This case reached the court *in banc* by transfer from the second division at the October term, 1891, after steps shown in the report of the case in 16 S. W. Rep. 384, and 19 S. W. Rep. 31. Our jurisdiction to review upon the merits is seriously challenged by plaintiff's counsel. The chronology of the material proceedings in the divisional court is this: April term, 1891: April 23, 1891, cause argued and submitted; May 19, 1891, judgment affirmed, opinion by Thomas, J.: May 26, 1891 motion for rehearing filed; October 12, 1891, motion for rehearing overruled; opinion

by Thomas, J. October term, 1891: October 14, 1891, motion to set aside order overruling motion for rehearing, filed, December 22, 1891; last motion sustained, rehearing granted, and cause transferred to court *in banc*, (Thomas, J., dissenting). The April term, 1891, expired after the motion for rehearing was denied, and the steps to set aside the overruling order were taken at a later (the October) term, 1891. This last "motion to set aside," etc., is based on grounds disputing the correctness of the legal propositions advanced in the divisional opinions. It does not assert any irregularity of procedure in reaching the result in the case. The plaintiff, on the other hand, insists that the motion was improvidently sustained, and that it was beyond the constitutional powers of division No. 2 to set aside its final judgment of the former term in that manner. It is plain that there must be a stage of every cause at which further investigation of its merits ceases. The interests of justice demand the establishment of some fixed terminal point to litigation. That point is ordinarily understood to be the close of the term of final judicial action in the case. But it may generally be moved further forward by appropriate steps, taken at that term, if authorized by law. Successive motions for review, in indefinite series, obviously cannot be tolerated by any court, though it is not so easy to mark the point at which they must stop. A standing rule here permits the filing of a motion for rehearing on certain stated grounds (102 Mo. Append. Rule 20; 16 S. W. Rep. vii), and in many instances those motions prove of great service and value to the court; but when one is denied, and the term thereafter lapses, we discover no authority on which to sustain further moves at a subsequent term to rectify judicial errors in a judgment. This court, some forty years ago, said: "There would be no end to litigation of county courts, or any other courts, could they review their own acts from term to term, and correct supposed errors in their past decisions. The matter is beyond their reach." *Peake v. Redd* (1851), 14 Mo. 83. To justify action by this court, or either division thereof, in any cause, at a later term than that at which the motion for rehearing is overruled, something must be done at that term to retain the jurisdiction to act upon it; otherwise no judicial errors therein can be reviewed after the term lapses. It was expressly so held by the second division of this court, with reference to extending time for bills of

exceptions in the circuit court, in *State v. Berry* (1890), 103 Mo. 367; 15 S. W. Rep. 621, following older cases; and the same principle governs the case before us. The rule of this court permitting motions for rehearing to be filed within ten days after the decision of a case, it may be conceded, amounts, in effect, to a standing order in each decided cause; but its force extends only to one motion for rehearing, and obviously is not intended to sanction an unlimited number of motions to set aside orders as they may be made, after the ruling upon the motion for rehearing. The United States supreme court and other courts of last resort have often ruled that a motion for rehearing on the merits, first made at a term subsequent to final judgment, cannot properly be considered. *Hudson v. Guestier*, 7 Cranch, 1; *Brooks v. Railroad Co.* (1880), 102 U. S. 107; *Milam Co. v. Robertson*, 47 Tex. 222; *Daniels v. Daniels*, 12 Nev. 118. That proposition is firmly settled, and beyond it we find no authority in the rules of court or in any order in this action authorizing the interposition of such a motion as that made herein October 14, 1891, after the close of the term at which the motion for rehearing was overruled. We are hence of opinion that this cause passed beyond the jurisdiction of this court to review, upon its merits, at the end of the April term, 1891; and consequently that the rehearing was erroneously granted thereafter. The order granting it should, we think, be vacated, and the "motion to set aside order overruling motion for rehearing" should be overruled. As the result of that action would be substantially the same as an affirmance of the judgment (*Bernard v. Callaway Co.* [1859], 28 Mo. 37), we concur in affirming for the reasons above indicated.

BRACE, J., joins in this opinion.

BLACK, C. J.—I concur in all that is ruled in the majority opinion except what is said in relation to the amount of damages.

The plaintiff's evidence tends to show that his horse, buggy, and harness were worth from \$215 to \$250. He says his practice had been worth to him on an average about \$2,500 per year, prior to the accident, and that his books would show a loss in the year after the injury of \$1,500. It is evident that this loss was due in a great measure to the fact that he had no horse and buggy to enable him to go to his country patients. This case was tried about

one year after the injury. His evidence as to his personal injuries is, in substance, this: "Three or four of my teeth were knocked out. My nose was broken. Cannot draw air through this nostril at all. It was not particularly injured so far as shape is concerned. The nerve is more affected than the bony structure. Three ribs were broken. Have an impression that they are loose, but am not clear about that. There is a constant uneasiness in one side, due, I should say, to partial paralysis. There was some injury to the spine. I suppose it was from the shock I received. I was in bed two or three weeks." He stated on cross-examination that he walked a great deal, and could walk reasonably well. Being asked what he meant by saying he thought his injury was permanent, he said: "I judge so. I presume so, more than upon any definite ground. My leg is uncomfortable, and I fear it will remain so for a long time." Giving to this evidence all inferences that can be fairly drawn from it in favor of the plaintiff, still I am of the opinion that the verdict is excessive. The plaintiff should be required to remit at least \$3,000, and, upon doing so, the judgment should be affirmed. If he refuses to remit this, the judgment should be reversed, and the cause remanded. *

RAILROAD COMPANIES. ACCIDENTS AT CROSSINGS.

1. Duty of company generally. Not an insurer against accidents. — A railroad company is not in such a case an insurer of the safety of the traveler, nor required to use means to prevent injuries which shall necessarily and in all cases be sufficient, efficient, and effective. *Chicago, K. & W. R. Co. v. Fisher*, 49 Kan. 460; 30 Pac. Rep. 462.

A locomotive engineer is not entitled to assume in all cases that persons on a public crossing will get off in time to save themselves. In running a train at a public crossing in a city he is bound to observe reasonable diligence, before he discovers peril as well as afterwards; and the company is responsible for his negligent errors of judgment. *Georgia Midland, etc., R. Co. v. Evans*, 87 Ga. 673; 18 S. E. Rep. 580.

2. Negligence of company. Speed of trains. Effect of ordinance regulating speed. — Where the whistle on an engine is sounded when the train is from a quarter to half a mile from a country grade crossing, so that it can be heard there, and the track can be seen for a distance of about 400 feet at a point 200 feet from the crossing, and 74 feet from the crossing it can be seen for 990 feet, it is not negligence to run a train at the rate of 50 miles an hour over such crossing. *Newhard v. Pennsylvania R. Co.*, 153 Penn. St. 417; 26 Atl. Rep. 105. To same effect, *Childs v. Pennsylvania R. Co.*, 150 Penn. St. 73; 24 Atl. Rep. 341. In this case it was held that, in an action against a rail-

* Reported in 21 S. W. Rep. 1094.

road company for causing death by a collision at a crossing, where the evidence showed that an approaching train could not be seen until within 900 feet, and the train was running at the rate of 45 to 50 miles per hour, the question whether the ringing of the bell gave sufficient warning of its approach was properly one for a jury.

Whether running a train over a considerably obstructed crossing at a high rate of speed, without the giving of any signal, is negligence, is a question for the jury. *McGill v. Pittsburgh & W. R. Co.*, 152 Penn. St. 331; 25 Atl. Rep. 540. In an action against a railroad company for negligent killing, there is no error in refusing to charge that it is not a want of ordinary care for a train to approach a highway crossing at its usual speed, although there is a team approaching, or that an engineer has a right to presume that a team approaching a crossing will stop, etc., since negligence in such a case is a question of fact for the jury to determine from the evidence, and they should be left free and untrammelled. *Illinois Central R. Co. v. Slater*, 139 Ill. 190; 28 N. E. Rep. 830.

It is negligence *per se* for a railroad company to run a train of cars in violation of a city ordinance limiting the rate of speed, and if any one is injured in consequence of such negligence, without fault on his part, he is entitled to recover damages. *Pennsylvania R. Co. v. Horton*, 132 Ind. 189; 31 N. E. Rep. 45; *Dahlstrom v. St. Louis, etc., R. Co.*, 108 Mo. 525; 18 S. W. Rep. 919. An ordinance limiting the speed of trains to four miles an hour was held not unreasonable in Cleveland, etc., *R. Co. v. Harrington*, 131 Ind. 426; 30 N. E. Rep. 37. It was also held in the same case that the fact that defendant's charter gave it the power to regulate the speed of its trains did not exempt it from the restriction imposed by the ordinance in question.

3. Negligence of company in respect to giving signals or warning.

—*Failure to give statutory signals must be proximate cause of accident.* In an action of trespass against a railroad company for injuries received at a railroad crossing by reason of the failure of the defendant to give the signal required by the statute, in order that the plaintiff should recover, he must not only prove that the defendant failed to give the signal required by statute, but that such failure was the proximate cause of his injury. *Butcher v. West Virginia & P. R. Co.*, 87 W. Va. 180; 16 S. E. Rep. 457. See also *Horn v. B. & O. R. Co.* (Ct. of App.), 54 Fed. Rep. 801; *Cleveland, etc., R. Co. v. Monaghan*, 140 Ill. 474; 30 N. E. Rep. 860; *Vallance v. Boston & Albany R. Co.*, 55 Fed. Rep. 364.

When failure to give statutory signals not negligence on the part of the company. A statute provided that the engineer who fails to ring the bell or sound the whistle of a locomotive 80 rods before crossing a highway should be guilty of a misdemeanor. *Held*, that this section imposes the duty of giving such signals solely on the engineer, and that his failure to give them is not negligence in law on the part of the company. *Vandewater v. New York & N. E. R. Co.*, 135 N. Y. 583; 32 N. E. Rep. 636.

What a sufficient compliance with statute as to blowing whistle. The Texas law (2 Sayles Civil St. art. 4232) provides that a whistle shall be blown by approaching locomotives at a distance of at least 80 rods from any place where a public road crosses the railway. *Held*, that the sounding of the whistle at a greater distance than 80 rods, but within such distance that a person at the crossing, possessed of ordinarily good hearing, could have heard it, was a suffi-

cient compliance with the statute. *Texas & P. R. Co. v. Bryant* (Ct. of App.), 56 Fed. Rep. 799.

Ordinances as to giving signals or warning. Municipal ordinances requiring the ringing of the locomotive bell whenever a steam-engine is approaching or crossing a public street, and requiring the presence of a flagman at important crossings, to the end that people may be suitably and seasonably warned of the approach of railroad trains, are reasonable and proper regulations; and failure by a railway company to observe such an ordinance is negligence. *Denver & R. G. R. Co. v. Ryan*, 17 Colo. 28; 28 Pac. Rep. 79.

Facts held not to excuse the failure to give warning of the train's approach. Plaintiff, on approaching the crossing of defendants' railroad, at the only point from which he could see an approaching train, until close to the crossing, looked and listened, and, not seeing or hearing any train, proceeded with his team walking, continuing to look and listen, until he was close to the crossing, when a train, without giving any of the signals required by law, or other warning, came rapidly, frightening his horses. Plaintiff attempting to hold them was thrown down and injured by the horses and wagon passing over him. *Held*, that defendant was not exonerated from liability for failing to give signals of the approach of the train by the fact that plaintiff's horses were frightened by the lawful sounding of the whistle as a signal for the crossing of another highway, as well as by the moving train; and because it did not appear that the horses were docile, or that plaintiff could have heard the signals if sounded and would have stopped, and could have controlled his horses at that distance. *Terre Haute, etc., R. Co. v. Brunker*, 128 Ind. 542; 26 N. E. Rep. 178.

Relative value of positive and negative evidence as to giving of signals. In an action against a railroad company for the death of plaintiff's intestate, caused by a collision with a train while attempting to drive over a crossing, a finding that defendant had failed to sound the whistle or ring the bell will not be disturbed on appeal, though the witnesses, some of them disinterested, who heard the signals, were as numerous as those who did not, and though the positive evidence of one witness is worth that of a dozen negative witnesses. *Urias v. Pennsylvania R. Co.*, 152 Penn. St. 326; 25 Atl. Rep. 566. The testimony of some credible witnesses that they heard the whistle and bell of the engine is not in conflict with the testimony of others, who heard nothing; for the observation of the fact by some is entirely consistent with the failure of others to observe, or their forgetfulness of its occurrence. *Horn v. Baltimore & O. R. Co.* (Ct. of App.), 54 Fed. Rep. 301.

4. Negligence of company. Gates and flagmen.—*As to duty to maintain gates.* In a suit for injuries to a child at a grade crossing there was no evidence of the volume of travel at the crossing, and nothing to show that it was a peculiarly dangerous place, except a remark of defendant's engineer that it was a bad place, and that an embankment on one side obscured a view of the train until a point within 30 to 60 feet of the track was reached. On one side of the track there was no house within a mile and a half of the crossing. Plaintiff's counsel stated in his opening that the place was unfrequented, and defendant produced no evidence of want of travel. *Held* insufficient to show

negligence of defendant in not providing a gate and gateman. *Vallance v. Boston & A. R. Co.*, 55 Fed. Rep. 364.

Opening gates when crossing unsafe. Where gates are maintained at a crossing, the public have a right to presume when the gates are open and in the absence of knowledge to the contrary, that there is no danger, and, if there is danger, the fact that the gates are open is evidence of negligence. *Evans v. Lake Shore, etc., R. Co.*, 88 Mich. 442; 50 N. W. Rep. 386; *Kleiber v. People's R. Co.*, 107 Mo. 240; 17 S. W. Rep. 946.

5. Negligence of company. Miscellaneous cases.—*Making flying switch over crossing.*—Whether a railroad company is negligent in severing a train into two parts, and making a flying switch over a highway crossing, is a question for the jury. *York v. Maine Central R. Co.*, 84 Me. 117; 24 Atl. Rep. 790. Some children playing near a railroad track within the limits of a town, upon hearing the whistle of an approaching train, placed pins upon the rail, and then ran into some bushes. The person in charge of the train intended to make a "flying switch," so as to cut out several cars from the middle of the train, and for that purpose the train was cut in three sections, the conductor pulling the pin between the first and second section, and then immediately going to the rear of the first car of the second section to man the brake. After the first section had passed, the children ran out from the bushes, and one of them, while stooping to pick up the pins, was struck by the second section, the conductor being unaware of his presence. The place of the accident was within the limits of a street which, according to the plat of the town, here crossed the track, but the street had not been opened for vehicles and was only used by pedestrians. *Held*, that on these facts the court properly refused to direct a verdict for defendant, for the failure to have a lookout on the front of the second section tended to show a want of proper care. *Chicago, etc., R. Co. v. McArthur*, 8 C. C. A. 594; 58 Fed. Rep. 464.

Failure to give warning of the starting of a train which has stopped on a crossing.—Where a freight train is stopped across a village street longer than the village ordinance allows, and people are crossing such street by passing between the cars of such train, it is a question for the jury whether it was not the duty of those in charge of such train to give proper warning of their intention to start the same. *Burger v. Missouri Pac. R. Co.*, 112 Mo. 238; 20 S. W. Rep. 439. Where a railroad company stops its train not to exceed a minute as it approaches a railroad crossing within the limits of an incorporated city, and while its cars are standing over a street crossing a child seven years of age, on his way home from school, attempts to take hold of the brake-ladder on a freight car in the train, for the purpose of climbing over the car, and the train starts just as he makes the effort to get on to the car and jerks him off, so that he falls under the wheels, and is run over and injured, and the trainmen have no knowledge of the attempt upon the part of the boy to board the train, *held*, that the company is not guilty of such negligence towards the boy as to render it liable for damages on account of such injury. *Atchison, etc., R. Co. v. Plaskett*, 47 Kan. 107; 26 Pac. Rep. 401.

Shunting cars over crossing without warning.—Evidence that railroad employes, operating a freight train, shunted three cars, without anyone thereon,

past a crossing, without any signal or warning, and that they knew that the driver of a team was approaching such crossing, is sufficient to support a finding of gross negligence on the part of the railroad. *Schindler v. Milwaukee, etc., R. Co.*, 87 Mich. 400; 49 N. W. Rep. 670.

6. Contributory negligence of plaintiff.—*General rule as to contributory negligence.*—A traveler on a public road must exercise at least ordinary care and caution. No recovery can be had by the plaintiff where his negligence in any degree contributed to the injury received by colliding with a railroad train at a public crossing, unless the defendant, being aware of the plaintiff's danger, and having the opportunity to avert it, fails to use ordinary caution to do so. *Butcher v. West Virginia & P. R. Co.*, 37 W. Va. 180; 16 S. E. Rep. 457.

Must be established by a preponderance of evidence.—Where a defendant relies upon the contributory negligence of the plaintiff as a defense, such contributory negligence must be shown by a preponderance of the evidence, or the defense will be unavailing. *Denver & R. G. R. Co. v. Ryan*, 17 Colo. 98; 28 Pac. Rep. 79; *Whilton v. Richmond & D. R. Co.*, 57 Fed. Rep. 551; *Crumpley v. Hannibal, etc., R. Co.*, 111 Mo. 152; 19 S. W. Rep. 820.

When plaintiff's evidence shows contributory negligence no recovery can be had.—Where negligence is the ground of the action it rests upon the plaintiff to trace the fault for his injury to the defendant, and for this purpose he must show the circumstances under which the injury occurred, and if, from these circumstances so proven by the plaintiff, it appears that the fault was mutual, or, in other words, that contributory negligence is fairly imputable to him, he has, by proving the circumstances, disproved his right to recover, and on the plaintiff's evidence alone the jury should find for the defendant. *Butcher v. West Virginia & P. R. Co.*, 37 W. Va. 180; 16 S. E. Rep. 457.

7. Contributory negligence. The duty to look and listen.—*General rule.* On approaching a street crossing of a railway track, it is the duty of a traveler to exercise his senses of sight and hearing, and look and listen for an approaching train. If he attempts to cross in front of a train which he sees, or if he attempts to cross without looking or listening for an approaching train, and he is struck by a train which he saw or which he might have seen or heard had he used his senses, he will be guilty of such contributory negligence as will prevent a recovery for his injuries. *St. Louis, etc., R. Co. v. Tippet*, 56 Ark. 457; 20 S. W. Rep. 161; *Denver & R. G. R. Co. v. Ryan*, 17 Colo. 98; 28 Pac. Rep. 79; *Korady v. Lake Shore, etc., R. Co.*, 131 Ind. 261; 29 N. E. Rep. 1069; *Thornton v. Cleveland, etc., R. Co.*, 131 Ind. 493; 31 N. E. Rep. 185; *Chicago, etc., R. Co. v. Fisher*, 49 Kan. 1460; 30 Pac. Rep. 462; *Herlish v. Louisville, etc., R. Co.*, 44 La. Ann. 280; 10 So. Rep. 628; *Balt. & O. R. Co. v. State*, 75 Md. 526; 24 Atl. Rep. 14; *Grosbeck v. Detroit, etc., R. Co.*, 90 Mich. 594; 51 N. W. Rep. 667; *Graf v. Chicago & N. W. R. Co.*, 94 Mich. 579; 54 N. W. Rep. 388; *Studley v. St. Paul, etc., R. Co.*, 48 Minn. 249; 51 N. W. Rep. 115; *Hauser v. Central R. Co.*, 147 Penn. St. 440; 23 Atl. Rep. 766; *Ash v. Wilmington & N. R. Co.*, 148 Penn. St. 183; 23 Atl. Rep. 898; *Schmidt v. Philadelphia, etc., R. Co.*, 149 Penn. St. 357; 24 Atl. Rep. 218; *Myers v. Baltimore & O. R. Co.*, 150 Penn. St. 386; 24 Atl. Rep. 747; *Grouer v. Del. & H. Canal Co.*, 153 Penn. St. 390; 26 Atl. Rep. 7; *Lees v. Philadelphia R. Co.*, 154

Penn. St. 46; 25 Atl. Rep. 1041; Norfolk & W. R. Co. v. Stone's Adm'r, 88 Va. 310; 13 S. E. Rep. 432; Flynn v. Eastern R. Co., 83 Wis. 238; 53 N. W. Rep. 494; Hausen v. Chicago, etc., R. Co., 88 Wis. 631; 53 N. W. Rep. 909; Horn v. Baltimore & O. R. Co. (Ct. of App.), 54 Fed. Rep. 301. Such traveler should look in both directions for approaching trains. Denver & R. G. R. Co. v. Ryan, 17 Colo. 98; 28 Pac. Rep. 79; Thornton v. Cleveland, etc., R. Co., 181 Ind. 492; 31 N. E. Rep. 185.

Duty when view temporarily obstructed by dust or smoke. It is the duty of a person intending to cross a railroad track where he knows that trains frequently pass, and where he knows that one is likely to pass at any moment, to look as well as to listen, and, if dust should temporarily obscure his view, to wait until the dust shall pass away before he attempts to cross. Chicago, etc., R. Co. v. Fisher, 49 Kan. 460; 30 Pac. Rep. 462. See McNamara v. New York Central & H. R. R. Co., 136 N. Y. 650; 32 N. E. Rep. 765.

Exceptions to general rule. The rule that a person who goes on a railroad track, or proposes to cross it, must use his eyes and his ears to avoid injury; and that, if he fails to do so, and is injured, he cannot recover, notwithstanding the negligence of the railroad company, is not of universal application, but has exceptions under exceptional circumstances. Jennings v. St. Louis, etc., R. Co., 112 Mo. 268; 20 S. W. Rep. 490.

Duty to look and listen how affected by failure to give the usual signals of warning. When, by reason of an omission or a neglect to sound the whistle or ring the bell of a locomotive as it is approaching a dangerous crossing, the vigilance of a traveler upon the wagon road is allayed, and he is led into a position or situation in which his life is jeopardized and finally lost, his lack of vigilance cannot be held to amount to culpable or concurring negligence, as a matter of law. Hendrickson v. Great Northern R. Co., 49 Minn. 245; 51 N. W. Rep. 1044. Plaintiff testified that, as she was driving towards the crossing, she "held up very slow," and hearing no bell, which she had heard on the previous evening, while at the crossing, notwithstanding the noise of the machinery on each side of her, concluded no engine was approaching, and drove on. *Held*, that it was not necessary for her to get out of her buggy, and go beyond the cars where she could see up and down the track, or to stop to look and listen for an approaching engine, when no signal was given of its approach. Alexander v. Richmond & D. R. Co., 112 N. C. 720; 16 S. E. Rep. 896. A person crossing a railroad has a right to assume that the statutory signals will be given, and so act. Crumpley v. Hannibal, etc., R. Co., 111 Mo. 152; 19 S. W. Rep. 820. See also Cleveland, etc., R. Co. v. Harrington, 181 Ind. 426; 30 N. E. Rep. 37; McNamara v. New York Central, etc., R. Co., 136 N. Y. 650, 32 N. E. Rep. 765; Neiman v. Delaware & H. Canal Co., 149 Penn. St. 92; 24 Atl. Rep. 96; Valin v. Milwaukee, etc., R. Co., 82 Wis. 1; 51 N. W. Rep. 1084; Ladouceau v. Northern Pac. R. Co., 4 Wash. 88, 29 Pac. Rep. 942; Jennings v. St. Louis, etc., R. Co., 112 Mo. 268; 20 S. W. Rep. 490.

One riding in public hack not bound to look or listen.—A female passenger in a public hack is under no duty to supervise the driver at a public crossing, nor to look or listen for approaching trains, unless she has some reason to distrust the diligence of the driver himself in respect to these matters. East Tenn., Va. & Ga. R. Co. v. Markins, 88 Ga. 60; 13 S. E. Rep. 855.

Whether plaintiff has looked from the right point or has exercised due care is a question for the jury.—McGill v. Pittsburgh, etc., R. Co., 152 Penn. St. 331; 25 Atl. Rep. 540; Cleveland, etc., R. Co. v. Harrington, 131 Ind. 426; 30 N. E. Rep. 37.

Waiting for train to pass and failing to observe approaching train on further track.—A traveler who, in order to let a freight train pass, stops his team at a point where his view of the crossing is obstructed by a building, is guilty of contributory negligence, as matter of law, in driving on to the crossing, though he looked before starting his horses, where the evidence is undisputed that if he had looked after passing the building, and before reaching the track, he could have seen the train with which he collided for the distance of over a third of a mile. Urias v. Pennsylvania R. Co., 152 Penn. St. 326; 25 Atl. Rep. 566. See also, Schmidt v. Philadelphia, etc., R. Co., 149 Penn. St. 357; 24 Atl. Rep. 218; Cleveland, etc., R. Co. v. Harrington, 131 Ind. 426; 30 N. E. Rep. 37; Calhoun v. Gulf, etc., R. Co., 84 Tex. 226; 19 S. W. Rep. 341; York v. Maine Central R. Co., 84 Me. 117; 24 Atl. Rep. 790.

Whether plaintiff may rely upon compliance with ordinance as to speed.—A traveler has no right to attempt to cross a railway track in front of an approaching train at what is nothing more than a common country crossing, although it is within the limits of a city, or to use a part of the railway within said limits as a footpath, relying solely upon the expectation or belief that the trains will be run not to exceed a certain rate of speed fixed by city ordinance. Studley v. St. Paul, etc., R. Co., 48 Minn. 249; 51 N. W. Rep. 115. To same effect, Korrady v. Lake Shore, etc., R. Co., 131 Ind. 261; 29 N. E. Rep. 1069.

Proof required where person crossing is killed.—A plaintiff administrator is not required, in all cases, to prove affirmatively that his intestate, who has been killed at the intersection of a public road with a railway, looked or listened for approaching trains. Hendrickson v. Great Northern R. Co., 49 Minn. 245; 51 N. W. Rep. 1044.

8. Contributory negligence. Facts of particular cases in which the question was held to be for the jury.—Defendants' railroad, running north east, crossed a street running east, at acute angles. Plaintiff, a woman forty years old, with sight and hearing unimpaired, approached the crossing, of four tracks, from the east. When eighty feet from the "down main" track, where she could see 800 feet up the tracks, she looked, and saw no train. At thirty-seven feet from the "down main" track, where she could see 400 feet up the tracks, she looked again, and saw no train. She then looked to the south-west, and in crossing the "down main" track was struck by a passenger engine and cars from the north-east, moving at the rate of twenty miles an hour, in violation of a four-mile ordinance, and ringing no bell. A freight train, with bell ringing, and steam escaping, had just passed. *Held*, plaintiff having a right to rely on defendant's compliance with the ordinance, and the accident having been probably caused by its violation, that the court would not say she was guilty of contributory negligence. Cleveland, etc., R. Co. v. Harrington, 131 Ind. 426; 30 N. E. Rep. 37.

Whether a traveler upon the highway, who sees the first section of a severed train pass over the crossing, is negligent in attempting to cross the track without looking or listening for the rear section of the train, is also a question for the jury. York v. Maine Central R. Co., 84 Me. 117; 24 Atl. Rep. 790.

In an action against a railroad for injury to plaintiff at defendant's crossing, the evidence as to ringing of the bell, blowing the whistle, the speed of the train, and the existence of a head-light was conflicting. It was dark and foggy at the time of the accident, and plaintiff testified that he was looking and listening, and was about eight feet from the center of the track when he first saw and heard the engine, about sixty feet distant, and immediately tried to get away, but was struck before he could do so. *Held*, that the question of plaintiff's contributory negligence was for the jury. *Thompson v. Toledo, etc., R. Co.*, 91 Mich. 255; 51 N. W. Rep. 995.

In an action against a railroad company for personal injuries, it appeared that plaintiff, when about to drive across defendant's track, stopped to look and listen for a train, and, not hearing or seeing any, drove on until within thirty feet of the track, when she saw a train approaching, and then attempted to back away. The engine whistled for the first time when about twenty-six rods from the crossing, and this caused the horse to rear, and to throw plaintiff's carriage down an embankment on the side of the road. The approach to the crossing was a driveway only five feet wide, recognized as unsafe. Plaintiff alleged, as combining to cause the accident, the failure of defendant or its predecessor in interest to restore the highway to as good condition as before the construction of the railroad, its failure to blow the whistle at the statutory distance of forty rods from the crossing, and the blowing of it near the crossing. *Held*, that the question of plaintiff's contributory negligence was for the jury. *Thayer v. Flint, etc., R. Co.*, 93 Mich. 150; 53 N. W. Rep. 216.

Plaintiff was injured while attempting to cross the defendant's track in a city. He attempted to cross between cars standing from 25 to 50 feet apart. He looked before he attempted to cross, and saw the cars, but did not see that they were moving. *Held*, that the evidence did not sufficiently show contributory negligence to warrant withdrawing the case from the jury. *Dahlstrom v. St. Louis, etc., R. Co.*, 108 Mo. 525; 18 S. W. Rep. 919.

In an action by an administrator against a railroad company for the death of plaintiff's intestate, it appeared that deceased was a young woman in full possession of all her faculties, and on a clear morning was on her way from her home to the place where she was employed, in doing which she traversed a street crossed by defendant's tracks; that when she reached the track she waited until a train passed the crossing; that she then looked in both directions along the track, and attempted to cross, in doing which she was struck by an engine and tender running backwards from around a curve at a high rate of speed; that the engine bell was not rung, nor whistle sounded, and the flagman was absent from his post. A witness for plaintiff, who saw the accident, testified that as the train passed for which deceased waited a volume of smoke from the engine settled down on the crossing, and prevented her from seeing objects approaching on the tracks. *Held*, that the question of deceased's contributory negligence was for the jury, and a verdict for plaintiff should not be disturbed. *McNamara v. New York Central, etc., R. Co.*, 136 N. Y. 650; 32 N. E. Rep. 765.

Where, in an action by the driver of a team against a railroad company for injuries occasioned by colliding with a locomotive at a crossing, there is evidence that the view of the track from the highway within 57 feet of the crossing was obstructed by a building six feet square, standing about 24 feet from

the track, and by steam from three exhaust pipes of an adjacent factory; that there was much noise from the working of eight heavy steam hammers; that plaintiff stopped several minutes near the track, and looked in the direction of the approaching train; and that the train was running at an unlawful speed, and no signals were given,—the question of plaintiff's contributory negligence is for the jury. *Neiman v. Delaware & H. Canal Co.*, 149 Penn. St. 92; 24 Atl. Rep. 96.

In an action against a railroad company for killing plaintiff's decedent at a crossing, it appeared that no train was due at that hour, and the engine was running at an unusual rate of speed, with only a snow pilot; that the track for some distance was 4 or five feet lower than at the crossing, so that from the crossing only the smoke-stack of the engine could be seen until it was within 125 rods; that between decedent and the track were logs piled 6 or 7 feet high; that it was snowing, and a strong wind blowing in a direction to carry all sound of the approaching engine from decedent; that no alarm by bell or whistle was given by the engine. The evidence was conflicting as to the care observed by decedent. *Held*, that the question of contributory negligence was one of fact for the jury. *Valin v. Milwaukee, etc., R. Co.*, 82 Wis. 1; 51 N. W. Rep. 1084. See also *Jennings v. St. Louis, etc., R. Co.*, 112 Mo. 268; 20 S. W. Rep. 490; *Ladouceur v. Northern Pac. R. Co.*, 4 Wash. 38; 29 Pac. Rep. 942; *Northern Pac. R. Co. v. Peterson (Ct. of App.)*, 55 Fed. Rep. 940.

9. Contributory negligence of children.—It is a question for a jury to determine, whether a boy who was injured at a railroad crossing exercised that degree of care which could reasonably be expected of him, considering his age, capacity and experience. *Spillane v. Missouri Pac. R. Co.*, 111 Mo. 555; 20 S. W. Rep. 293. See, also, *Georgia Midland & G. R. Co. v. Evans*, 87 Ga. 673; 13 S. E. Rep. 580; *Burger v. Missouri Pacific R. Co.*, 112 Mo. 238; 20 S. W. Rep. 489.

10. Imputed negligence. Negligence of driver of vehicle in which plaintiff riding.—A wife, entirely free from negligence, was riding with her husband over a railroad crossing, and was injured by the negligence of the railroad company. Her husband was guilty of contributory negligence. *Held*, that the husband's negligence could not be imputed to the wife. *Louisville, etc., R. Co. v. Creek*, 130 Ind. 189. 29 N. E. Rep. 481.—To same effect, *Phillips v. New York Central, etc., R. Co.*, 127 N. Y. 657; 27 N. E. Rep. 978; *Lapsley v. Union Pac. R. Co.*, 50 Fed. Rep. 172; *East Tenn., Va. & G. R. Co. v. Markens*, 88 Ga. 60; 13 S. E. Rep. 855. In the latter case the following instruction was held to be correct: "I do charge you that the negligence of the driver, if he was negligent, is not imputable in law to her. A person who hires a public hack, and gives the driver directions as to the place where he wishes to be conveyed, but exercises no other control over the conduct of the driver, is not responsible for his acts of negligence, or prevented from recovering against the railroad company for injuries suffered from a collision of its train with the hack, if the same was caused by the concurring negligence of both the manager of the train and the driver of the hack. The only negligence on the part of the driver which will defeat or otherwise affect the right of Mrs. Markens to recover is embodied in the following proposition: If the negligence of the driver was the sole cause and the real cause of the collision, she cannot recover. If

the driver and the manager of the train were guilty of negligence, both concurring to bring the collision about, such negligence on the part of the driver cannot have the effect either to defeat or diminish the plaintiff's right to recover."

11. Evidence.—Positive and negative evidence.—An instruction to the effect that the jury should give greater weight to a positive statement of one witness than to the negative statement of another witness was properly refused. *Ohio & M. R. Co. v. Buck*, 180 Ind. 300; 30 N. E. Rep. 19. The simple statement of the plaintiff that she did not hear any whistle or bell was not sufficient, as against the positive testimony of six other witnesses who did hear them, to establish a charge of negligence against the defendant. *Hauser v. Central R. Co.*, 147 Penn. St. 440; 23 Atl. Rep. 766. As evidence of whether a bell was rung, witnesses may testify that they would have heard the bell if it had been rung. *Illinois Central R. Co. v. States*, 139 Ill. 190; 28 N. E. Rep. 830.

Photographs.—In a case where it was a material question whether or not the view of the train which killed the deceased was obstructed by box cars then standing on a side track, and by other objects near the crossing, it is not error to refuse to admit in evidence photographs of the locality, taken two months after the accident, by a mere amateur photographer, who had never visited the locality before, especially when the court admitted a plat which showed the situation of the permanent objects at the place of the accident, *Cleveland, etc., R. Co. v. Monaghan*, 140 Ill. 474; 30 N. E. Rep. 869.

Life tables.—In a case where the expectation of life of deceased is a question for the jury, the Carlisle mortality tables are admissible in evidence, but are not conclusive; the expectation being affected by the particular circumstances of the case. *Steinbrunner v. Pittsburgh & W. R. Co.*, 146 Penn. St. 504; 23 Atl. Rep. 239.

Res gestæ. Exclamations of by-standers. In an action to recover for personal injuries received in jumping from a horse car in apprehension of a collision with a train, evidence was received of the acts of the passengers and of outcries by them and by-standers. *Held*, that this was admissible as part of the *res gestæ*, and as evidence that plaintiff was actuated by reasonable apprehension. *Kleiber v. People's R. Co.*, 107 Mo. 240; 17 S. W. Rep. 946.

When question of negligence for jury. General rule. Where, in an action to recover for personal injuries, the questions to be determined are what the parties did or omitted, and what a prudent man should have done under the circumstances; and the facts are such that fair-minded men might come to different conclusions,—the question of negligence is one of fact to be found by the trier, and the finding will not be reviewed on appeal, unless it appears from the record that some rule of law has been violated. *Andrews v. New York, etc., R. Co.*, 60 Conn. 293; 22 Atl. Rep. 566.

Accident at private crossing. The fact that the crossing where the accident occurred, was a private way is immaterial, where it was commonly used with the knowledge of and without objection from the railroad employes, who had often opened trains standing on the crossing to allow public travel over it. *Shindler v. Milwaukee, etc., R. Co.*, 87 Mich. 400; 49 N. W. Rep. 670. But see *McCreary v. Boston & M. R. Co.*, 153 Mass. 300; 26 N. E. Rep. 864.

NORTH BIRMINGHAM ST. RY. CO. V. LIDDICOAT.

(Supreme Court of Alabama. April 25, 1893.)

1. STREET RAILROADS. INJURY TO ONE BOARDING CAR. WHAT CONSTITUTES A PERSON A PASSENGER. SUFFICIENCY OF DECLARATION.—In an action against a railroad company for injuries to plaintiff by the giving way of a handle on the car which plaintiff took hold of while entering it, a complaint, which fails to allege that it was at a station provided for passengers, or at a place where it was usual or customary to receive passengers, or that plaintiff was invited or knowingly permitted to attempt to board the car, or that he was in any way accepted as a passenger, fails to show any relation existing between the parties devolving on defendant the duty towards plaintiff of maintaining its car in repair.

2 The allegation that plaintiff was in the act of getting on the car "as a passenger, as he had a right to do," is a mere statement of the pleader's conclusion, and without weight in determining the sufficiency of the pleading.

3. The allegation that plaintiff attempted to board the car a short distance south of where defendant's line crossed another railroad does not, by reason of the statutory requirement that trains shall be brought to a full stop before crossing the tracks of an intersecting line, raise the inference that the car was at rest, as it is not averred that the train was on a north-bound trip or that it was within a hundred feet of the crossing, the distance at which trains are obliged to stop.

THIS was an action brought by the appellee, William Liddicoat, by his next friend to recover damages for personal injuries, alleged to have been sustained by reason of the negligence of the defendant, the North Birmingham Street Railway Company. There was judgment for the plaintiff, and defendant appeals.

The defendant interposed a demurrer to the complaint upon the following grounds: (1) Because it does not allege that the defendant's train was at a station or regular stopping place where passengers were received and discharged, when the plaintiff attempted to get aboard of the train. (2) Because it does not allege that the defendant or its servants knew or could have known that William Liddicoat was attempting to get aboard the train when he received the injuries complained of. (3) Because the complaint shows that plaintiff, was guilty of contributory negligence that was the proximate cause of the injuries complained of by him, and does not allege that the defendant was guilty of wanton negligence or intentional

negligence. The court overruled each of these grounds of demurrer.

Garrett & Underwood, for appellant. *Chas. P. Jones* and *W. R. Houghton*, for appellee.

STONE, C. J.—Appellee, a minor between eleven and twelve years of age, sued appellant, a street railway company operating cars with dummy engines, to recover damages for alleged injuries sustained by plaintiff while attempting to board one of appellants trains. The train he attempted to board was going from the city of Birmingham to North Birmingham, and was approaching a point where the Birmingham Mineral Railroad Company's tracks cross appellant's tracks, when it came to a stop just before reaching the crossing, and then proceeded on its way. Appellant has passenger stations at short intervals along its road, one of which is located about 200 feet north of the intersection of the two roads, but it has no station at the point where appellee attempted to enter its car. It was, however, a common, if not daily, occurrence for persons to take advantage of the momentary stoppage of the train as it approached the crossing, to board or alight from its cars, and it does not appear that this practice was ever prohibited, or objected to, by appellant or its servants in charge of its trains. The habitual stopping of the train at this point was in consequence of the requirements of the statute, (Code, § 1145), and not for receiving and discharging passengers, though that had become a frequent, if not daily, occurrence, as stated above. On the 23d of March, 1891, appellee was standing on the side of appellant's track, either upon or near the roadway of the intersecting road, when appellant's train, consisting of an engine and two cars, approached the crossing, going north. One of the cars was an ordinary passenger coach and the other an open car having running boards extending along each side, which furnished a step to passengers getting on or off the car. Appellee attempted to board one of the cars, but fell, and one of the trucks passed over and crushed his leg, necessitating amputation. For that injury this suit was brought. Whether appellee, when he attempted to board the train, was standing on the track of the intersecting road, and attempted to get on the car while the train was in motion, or

whether he was south of the crossing and the train at rest when he made the attempt, are questions as to which the testimony is conflicting. There is also direct conflict in the testimony as to the cause of appellee's fall. His statement is that he undertook to board the open car while the train was at rest, south of the crossing, the open car being next to the engine; that he stepped on the running board, and seized with his hand the arm or support attached to the car to assist passengers in getting in and out of the car; that one end of the arm or support broke loose from its fastenings, and precipitated him upon the track. The engineer on the other hand, testified that he was looking at appellee when the accident occurred; that he saw him as the train was passing standing on the roadway of the Birmingham Mineral Railroad Company at its intersection with appellant's road; and that the box passenger coach being next the engine appellee jumped on the rear steps of that car and seized hold of the railings; that he lost his hold and fell on the track and the front truck of the rear car passed over his leg; that the railing of which he took hold did not break loose and was not out of repair. There is other testimony seemingly corroborative of each of these versions of the accident. The averments of the complaint, so far as material to be noticed, are that "on the day and year aforesaid, at a point in North Birmingham, on defendant's line of road a short distance south of where the defendant's road crosses the Birmingham Mineral Railroad the plaintiff boarded or attempted to board, or attempted to and was in the act of getting on, one of the defendant's passenger cars, as a passenger, as he had the right to do; that the car the plaintiff was attempting to get on was an open car with a running board on each side for passengers to get on and into the car; that on each of the seats of said car was a handle or arm made and used for the purpose of enabling passengers to catch hold of the same, to enable them to pull themselves into the car; that plaintiff caught hold of one of these handles or arms, and was pulling himself into the car, when the handle or arm turned or broke, whereby plaintiff was thrown to the ground and under the car, and his leg was run over, etc." There was a demurrer to the complaint, which was overruled. The defendant then pleaded the general issue and contributory negligence on plaintiff's part. The errors assigned are the rulings of the court on the demurrer to the complaint on

the charges given and refused, and on the motion for a new trial.

It may be declared as a general rule that the relations of carrier and passenger are founded in contract, either expressed or implied, made upon a valuable, but, not necessarily a pecuniary, consideration; "and when such relations bring one of the parties into contact with a material agency which the contract requires the other party to supply, the law exacts of him who supplies that agency the duty of exercising care in its selection, maintenance in repair, and operation." 2 Amer. & Eng. Enc. Law, p. 739. The relation begins "when the contract of carriage having been made, or the passenger having been accepted as such by the carrier, he has come upon the carrier's premises, or has entered any means of conveyance provided by the carrier." Id. p. 244. It is the duty of the carrier to provide safe and convenient stations, and means of ingress to and egress from its cars; and if a person has the *bona fide* intention of taking passage by a train, and goes to a station at a reasonable time, he is entitled to protection in these respects, as a passenger, from the moment he enters the carrier's premises. The carrier may, by proper notice, prohibit the receiving or discharging of passengers at other places than the stations provided by it, and persons attempting, uninvited, to board its trains at such other places, in the absence of wanton or willful negligence on the part of the carrier, act at their own peril until they have entered its carriage, or are accepted as passengers. If, however, a carrier is in the habit of receiving or discharging passengers at a place other than a regular station, or persons are invited or directed by its authorized servants to board or alight from its cars at such other places, they have the right to presume that it is safe to board or quit the train at such place, unless the risk in doing so is so obvious that a man of ordinary care and prudence would not, under like circumstances, make the attempt. Railroad Co. v. Kane, 69 Md. 11; 13 Atl. Rep. 387. It is immaterial for what purpose its cars are stopped at such place, other than a regular station, whether in consequence of a duty enjoined on it by law, as when approaching the track of an intersecting road, or arising from convenience or necessity in the usual mode of operating its trains. If the public are in the habit of entering or quitting its cars at such place, without objection from its agents or servants, such persons are entitled to the protection of all the duties imposed upon

the carrier in receiving and discharging passengers at its regular stations, except in so far as it may be relieved therefrom by obvious risks, incident to the nature and condition of such place of customary use. The customary use of such place for receiving and discharging passengers may become so generally known and well established as to impose upon the carrier the duty of maintaining such place in as safe and convenient condition as a regular station, and to authorize a passenger, without notifying the conductor or other servant of the carrier of his desire or intention to board the train, to presume that a reasonable opportunity will be afforded him for that purpose, and that it is safe to do so. A passenger attempting to board a train at such place, and under such circumstances, is as much justified in the assumption that the carrier's cars are in a safe condition as he would be were he attempting to board them at a regular station; for the duty of the carrier to so maintain them attaches in all cases and under all circumstances where the relation of carrier and passenger exists, either by express contract or by implication of law. What has been said has no application to a person who, being at either a regular station, or a place of customary use for receiving and discharging passengers, has not a *bona fide* intention of boarding a train as a passenger, but simply intends or attempts to obtain passage without the knowledge and consent of the carrier's servants or employes, and without paying fare. Such a person would in no sense be a passenger, but a trespasser, to whom the carrier would owe no higher duty than to refrain from wanton or willful negligence; or, upon discovering him to be in a position of peril, to employ such reasonable care as the facilities at hand would permit, to avoid the threatened injury. *Railroad Co. v. Webb* (Ala.), 12 South Rep. 374; *Railway Co. v. Womack*, 84 Ala. 149; 4 South. Rep. 618. But the failure of the carrier to maintain its cars in repair would not, as respects such person, be either wanton or willful negligence, however gross such negligence might be, and for an injury resulting under such circumstances the carrier would not be answerable in damages to the person injured. Whether or not a person is a passenger is generally a question for the jury, and always so when different inferences may be drawn from the testimony. *Brown v. Scarboro*, (Ala.) 12 South Rep. 289. There is testimony in the case before us tending to show that appellee

was, when injured, attempting to board one of appellant's cars with the *bona fide* intention of riding thereon, upon paying the customary fare; while, on the other hand, there is testimony tending to show that his attempt to board the train at the time and place mentioned was prompted by a mere boyish propensity,—in common parlance, to “steal a ride,”—as he had done or attempted to do on other occasions; and if the testimony on another trial should be substantially as we now find it, the question will be one for the jury under proper instructions from the court.

It cannot be affirmed as a universal proposition of law that it is negligence *per se* for a person to attempt to board a moving train. The age and physical condition of the person making the attempt, the rate of speed of the train, the nature of the car and of the place, and all the attendant facts and circumstances enter into the question; and while any one of these facts might possibly be sufficient to justify the conclusion of negligence as matter of law, ordinarily it is a question for the jury, the test being whether a person of ordinary care and prudence would, under similar circumstances, have made the attempt. *Railroad Co v. Kane*, 69 Md 11; 13 Atl. Rep. 387; *Railway Co. v. Stewart*, 91 Ala. 421; 8 South Rep. 708. All the questions for review in this case may be solved when tested by the principles we have above formulated.

Taking up, now, the demurrer to the complaint, and construing as we must, the averments of the latter most strongly against the pleader, we are unable to declare that the complaint shows on its face that the relation of carrier and passenger legally existed between appellant and appellee at the time the alleged injury was suffered. It is not averred that appellee was attempting to board the train at a station provided for passengers, or at a place where it was usual or customary to receive passengers on its cars, or that appellee was invited or knowingly permitted to attempt to board the car by any authorized servant or employe of the company, or that he was in any manner accepted as a passenger. In the absence of averments showing an express contract of carriage, or of facts from which such contract is implied in law, no relation is shown to have subsisted between the parties at the time of the accident that devolved upon the appellant the duty towards the appellee of maintaining its cars in repair. Failing in this respect, and there being no averment that the injury was caused by the wanton or

willful negligence of the company, no cause of action is shown for which it is answerable to appellee. *Railroad Co. v. Hairston*, (Ala.) 12 South. Rep. 299; *Railway Co. v. Chewning*, 93 Ala. 24; 9 South. Rep. 458. We are not unmindful of the averment in the complaint that "plaintiff was in the act of getting on one of the defendant's passenger cars as a passenger, as he had the right to do," but these words were the mere averment of the pleader's conclusion. No facts are stated, and no weight can be accorded them in determining the sufficiency of the complaint. They are perfectly consistent with a most heedless attempt to board the train when in motion and at a place not set apart by any order or usage of the company for receiving passengers. Moreover, there is almost irresistible implication that, when the attempt was made to board the car, the train was in motion. There is a manifest distinction in this respect between the complaint in this case and that in *Railroad Co. v. Jones*, 83 Ala. 377; 3 South. Rep. 902. In the latter the averment that the plaintiff's intestate was a passenger is supported by the statement that she was in the defendant's coach, — a position which, of itself, *prima facie* indicated the relation of passenger; while here there is no fact averred in the complaint which indicates that appellee had become, or was in a position entitling him to become, a passenger in appellant's train at the time of the accident. When we look to the averments of fact in the complaint, as controlled by the intendments against the pleader, it must be inferred from the complaint that appellee's attempt to board the train was at a place where he was not authorized or invited to make the attempt; that the cars were in motion at a rate of speed which would have deterred a man of ordinary care from making the attempt under like circumstances; and that in making such attempt appellee was a trespasser. *Montgomery v. Railway Co.* (Ala.) 12 South. Rep. 170; *Railway Co. v. Chewning*, 93 Ala. 24; 9 South. Rep. 458.

It is contended in argument for appellee that it must be inferred the train was at rest when appellee undertook to board it, because of the averment that appellee's attempt to board was made when the train was "a short distance south of where the defendant's road crosses the Birmingham Mineral Railroad," and because of the statutory requirement that trains shall be brought to a full stop before crossing the tracks of an intersecting road. There are con-

clusive reasons why this argument cannot prevail. Although the court takes judicial knowledge of the requirements of the statute, and it is averred in the complaint that appellee's train was south of the crossing, it is not averred that the train was on a north-bound trip. Indulging the view most unfavorable to the pleader as we must, the train at the time of the accident was south bound, and therefore, according to the complaint, had passed the intersecting road, and, consequently, the point where it was required by the statute to come to a stop. On the other hand, if we could assume the train was north-bound, it is not averred it had approached within 100 feet of the crossing when plaintiff, undertook to board it, that being the distance from the crossing at which it was required by the statute to come to a full stop. The averment that the train was "a short distance south of where the defendant's road crosses the Birmingham Mineral Railroad" is not the the equivalent of an averment that the train was within 100 feet of the crossing. This last fact is not necessarily implied in the averment made. The inference does not arise, as matter of law, from the facts averred in the complaint, that appellant's train was at rest when appellee attempted to board it, but as we have shown, the intendments on demurrer are to the contrary.

It results from the foregoing principles that the first and second grounds of demurrer to the complaint should have been sustained; and in view of the intendments against the pleader, as above indicated, it may be the third ground of demurrer should have been sustained, notwithstanding contributory negligence is ordinarily matter of defense. We cite the following authorities: *Railroad Co. v. Hairston*, (Ala.) 12 South. Rep. 299; *Montgomery v. Railway Co.*, Id. 170; *Railway Co. v. Chewning*, 93 Ala. 24; 9 South Rep. 458. The charges given and refused by the court, on which the remaining assignments of error are based, need not be specially noticed. The principles we have announced will furnish sufficient guide on another trial. For the error of the city court in overruling the demurrer to the complaint its judgment is reversed, and the cause is remanded.*

1. Street railroads. Whether one getting upon car while in motion is a passenger.—In *North Chicago St. R. Co. v. Williams*, 14 Ill.

* Reported in 13 So. Rep. 18.

275; 29 N. E. Rep. 672, the plaintiff boarded an open summer car while it was in motion and was knocked off by contact with a telegraph pole, while in the act of stepping to a seat in the car. The cars were being operated on a temporary track near the curb, pending the reconstruction of the permanent track for use of the cable system. A rule of the company forbid passengers getting on or off the car while in motion. Plaintiff swore that he did not know of the rule, but it was admitted that he was in the habit of riding on the defendant's cars. The conductor of the car saw the plaintiff get on the car and made no attempt to warn him or prevent his doing so. The court held that it was a question for the jury whether the defendant had not waived the rule and invited the plaintiff to board the car as he did. On the assumption that plaintiff got on the car in known violation of a rule of the company, the court says: "But we are not prepared to hold that a party is a trespasser after he gets on a horse car, even though no fare has been collected of him before he meets with an injury, simply because he has violated a rule of the company as to the mode of his getting on. * * * It is not necessary that there be an express contract in order to constitute the relation of carrier and passenger; nor that there should be a consummated contract. The contract may be implied from slight circumstances, and it need not be actually consummated by the payment of fare, or entry into the car or boat of the carrier. The whole matter seems to depend largely upon the intention of the person at the time he enters the boat or cars," etc. *Thomp. Carr.*, pp. 42, 43. In *Butler v. Railroad Co. (N. Y.)*, 24 N. E. Rep. 187, it was said: "It does not seem reasonable to assume as a matter of law that a person who, in an orderly way, attempts to enter a street car as a passenger is to be regarded as a trespasser until a special contract has been made with the conductor based upon the payment of the required fare."

2. Starting car while plaintiff is in the act of getting on. Negligence and contributory negligence.—Plaintiff, in an action against a horse-railway company, testified that on the approach of one of defendant's cars he signaled it to stop; that the speed of the car was slackened; that as it passed he seized the hand-rail on the rear platform, and planted his foot on the step; that the brake was relaxed, and the car started with a sudden jerk, throwing his feet from under him, and dragging him some distance, injuring him severely. *Held*, that the question as to negligence on the part of defendant and contributory negligence on the part of plaintiff was for the jury. *Morrison v. Broadway & S. A. R. Co.*, 130 N. Y. 166; 29 N. E. Rep. 105.

3. Starting car before plaintiff is seated. Infirm passenger.—In an action against a street-car company for injury to a passenger, the evidence showed that plaintiff, an elderly lady, entered the car by the front platform, and that before she reached her seat the car started, and she fell down. *Held*, that whether plaintiff's conduct in entering the car from the front platform, and going towards a seat with her back to the horses, without steadying herself by the use of the straps placed in the car for that purpose, constituted contributory negligence, was for the jury. *Holmes v. Allegheny Traction Co.*, 153 Penn. St. 152; 25 Atl. Rep. 640. The driver of a street car is bound to take more care of an old person than of one in full vigor, and whether starting a car in the usual and ordinary manner, after an old lady has entered it, is neg-

ligence, is a question for the jury. *Ibid.* See, also, *Akersloot v. Second Ave. R. Co.*, 181 N. Y. 599; 80 N. E. Rep. 195.

4. Duty to child trespassing upon car. Frightening or pushing child from car.—The evidence in an action for damages showed that plaintiff, a girl between eleven and twelve years old, jumped on the front platform of a street car of defendant, and that while holding the grab handles the driver, after whipping up his horses, hit her on the hands, and, failing to loosen her hold, violently pushed her off the step, and that she fell under the car and was run over. *Held*, that the court rightly charged that, if the injury occurred in that way, defendant was liable. *Barre v. Reading City Pass. R. Co.*, 155 Penn. St. 170; 26 Atl. Rep. 99. Even if plaintiff was a trespasser, the driver was not justified in removing her from the car with such disregard of her personal safety; but plaintiff's youth exempted her from the charge of being a "trespasser," in the legal signification of the word. *Ibid.*

Where a child riding on the platform of a street car is of such tender years as not to be chargeable with negligence, and there is some evidence, although disputed, that the conductor approached for fare in a manner calculated to frighten him; so that he jumped and was injured, the case is for the jury. *Sandford v. Hestonville, etc., R. Co.*, 153 Penn. St. 300; 25 Atl. Rep. 833.

HENNINGTON v. STATE.

(Supreme Court of Georgia. June 8, 1892.)

RAILROAD COMPANIES. VALIDITY OF STATUTE PROHIBITING THE RUNNING OF TRAINS ON SUNDAY, INTER-STATE COMMERCE. The provision of section 4578 of the Code of Georgia, making it a misdemeanor to run a freight train upon any railroad in that state on the Sabbath day is a regulation of internal police, and not a regulation of commerce. It is not in conflict with the constitution of the United States, even as to freight trains passing through the state from and to adjacent states, and laden exclusively with goods and freight received on board before the trains entered this state, and consigned to points beyond its limits.

ERROR by L. F. Hennington to reverse a judgment convicting him of a violation of the statute prohibiting the running of freight trains on Sunday.

W. U. & J. P. Jacoway and *R. J. & J. McCamy*, for plaintiff in error. *A. W. Fite*, Sol. Gen., for the State.

BLECKLEY, C. J.—If the sanction of time can ever be invoked to justify the exercise of governmental authority over a particular subject-matter, this can certainly be done in respect to setting aside one day in each week for rest and the cessation of all unnecessary

labor. A law to this effect prevailed in the earliest times of which we have any authentic record, and the subject was one of statutory regulation in Georgia during her colonial period, and has so continued throughout the whole term of her existence as a state. At no instant since her independence was declared has she been without such a law on her statute book. It is not only unlawful, but penal, for any person whatsoever to "pursue their business or work of their ordinary calling upon the Lord's day, works of necessity or charity only excepted." Code, § 4579. This prohibition upon Sunday labor was already in force when the Code was adopted, and dates back to the year 1762. The penalty prescribed by the colonial statute has been changed, but in other respects that statute has been operative continuously since it was enacted. There can be no well founded doubt of its being a police regulation, considering it merely as ordaining the cessation of ordinary labor and business during one day in every week; for the frequent and total suspension of the toils, cares, and strain of mind or muscle, incident to pursuing an occupation or common employment, is beneficial to every individual, and incidentally to the community at large,—the general public. Leisure is no less essential than labor to the well-being of man. Short intervals of leisure at stated periods reduce wear and tear, promote health, favor cleanliness, encourage social intercourse, afford opportunity for introspection, and retrospection, and tend in a high degree to expand the thoughts and sympathies of people, enlarge their information, and elevate their morals. They learn how to be and come to realize that being is quite as important as doing. Without frequent leisure, the process of forming character could only be begun. It could never advance or be completed. People would be mere machines of labor or business,—nothing more. If a law which, in essential respects, betters for all the people the conditions, sanitary, social, and individual, under which their daily life is carried on, and which contributes to insure for each, even against his own will, his minimum allowance of leisure, cannot be rightly classed as a police regulation, it would be difficult to imagine any law that could. With respect to the selection of the particular day in each week which has been set apart by our statute as the rest day of the people, religious views and feelings may have had a controlling influence. We doubt not they did have, and it is probable that

the same views and feelings had a very powerful influence in dictating the policy of setting apart any day whatever as a day of enforced rest. But neither of these considerations is destructive of the police nature and character of the statute. If good and sufficient police reasons underlie it, and substantial police purposes are involved in its provisions, these reasons and purposes constitute its civil and legal justification, whether they were or not the direct and immediate motives which induced its passage, and have for so long a time kept it in force. Courts are not concerned with the mere beliefs and sentiments of legislators, or with the motives which influence them in enacting laws which are within legislative competency. That which is properly made a civil duty by statute is none the less so because it is also a real or supposed religious obligation; nor is the statute vitiated, or in any wise weakened, by the chance, or even the certainty, that in passing it the legislative mind was swayed by the religious, rather than by the civil, aspect of the measure. Doubtless, it is a religious duty to pay debts, but no one supposes that this is any obstacle to its being exacted as a civil duty. With few exceptions the same may be said of the whole catalogue of duties specified in the ten commandments. Those of them which are purely and exclusively religious in their nature cannot be or be made civil duties, but all the rest of them may be, in so far as they involve conduct as distinguished from mere operations of mind or states of the affections. Opinions may differ, and they really do differ, as to whether abstaining from labor on Sunday is a religious duty; but, whether it is or not, it is certain that the legislature of Georgia has prescribed it as a civil duty. The statute can fairly and rationally be treated as a legitimate police regulation and, thus treated, it is a valid law. There is a wide difference between keeping a day holy as a religious observance and merely forbearing to labor on that day in one's ordinary vocation or business pursuit. Nor is the statute a regulation of commerce. It applies alike to all business, vocations and occupations. It concerns the general police of the state and all interests, whether agricultural, mechanical, manufacturing, commercial, professional, or what not. It is universal, and rigidly impartial, making no discrimination whatever for or against commerce or anything else. It puts no obstacle in the way of trade or its operations which is not encountered by every other class

of worldly business or employment. Non-trading days are non-business days, generally, and non-working days for all the people. Trade may go on when anything else can. It stops only when, and so long as, there is a complete suspension of worldly enterprise and activity. It is required to take no rest which is not appointed for everything else to take.

Having now classified the colonial act of 1762, as brought down to us in section 4579 of the Code, it is easy to see that the later legislation, embraced in section 4578 of the Code belongs to identically the same class, and seeks only to enforce and render effective, as respects the running of freight trains on Sunday, the scheme of internal police which the former established as universal throughout the state for all industries and avocations. On the assumption that the running of such trains on Sunday, under ordinary circumstances, is not a work of necessity, the running of them on that day was already prohibited by virtue of the prior statute when the later one was passed. The new legislation silently assumes that the running of these trains on Sunday is not a work of necessity; and, in express terms, it renders the superintendent, or other officer having control of the running of trains, answerable penally for any running which may be done on that day. As the person having the right and power to prevent it, he is held responsible for its occurrence whenever it does occur, save when it is done by others in violation of his own orders and rules. The language of the statute, so far as now material, is as follows: "If any freight train shall be run on any railroad in this state on the Sabbath day (known as Sunday), the superintendent of transportation of such railroad company, or the officer having charge of the business of that department of the railroad, shall be liable for indictment for misdemeanor in each county through which such train shall pass. * * * The defendant may justify himself by proof that such employes acted in direct violation of the orders and rules of the defendant." Code, § 4578. The section of the Code just cited embraces qualifying provisions added by Acts 1873, p. 63, and Acts 1874, p. 97. A still further qualification may be found in Acts 1882-83 p. 66. None of these qualifications are directly pertinent to the present inquiry. We hold confidently, and without doubt, that section 4578 is no more a regulation of commerce than is section 4579; that both are

to be taken and construed together ; and that the former is part and parcel of the police system generalized in the latter, but first drawn out in one of its details by the former, and applied to the specific work or business mentioned, in so far, and in so far only, as superintendents or train managers are concerned. In so far as employes engaged immediately in running freight trains on Sunday are concerned, section 4578 has no direct application. They are still left to be dealt with under the other section. It is almost superfluous to add that we deem it of no consequence that in the case now under consideration the freight train run on Sunday was merely passing through and over some of the territory of this state on its journey from the state of Tennessee into the state of Alabama, and was laden exclusively with goods and freight received on board before it entered this state, and consigned to points in Alabama or beyond. It is no valid objection to a police regulation that it may incidentally affect interstate commerce or persons engaged therein. Almost any broad and comprehensive police regulation may have such a consequence in a greater or less degree. Nothing can be legitimate police which would prohibit, unduly restrict, or unreasonably delay interstate commerce ; but to call a weekly halt to all business of every kind throughout the length and breadth of the state is to treat interstate commerce as everything else is treated, and surely what is exacted by law to be done, and has been generally done in Georgia for more than 100 years, is not, in itself unreasonable. The right of every state to enact a similar law,, and the possible chance that one state may select one day of the week for rest, another state another day, and so on, until a wide reach of interstate commerce would find itself unable to move at all, cannot fairly be urged in condemnation of the police system prevailing at present in Georgia. Every system is reasonable or not, according to conditions. When conditions change, it is time enough to change the system ; and it may well be assumed that any necessary change will be made in due time. So far as appears, and so far as we are aware, no day of the week except Sunday is anywhere in the United States a day of enforced rest. We are not now practically concerned with what is possible if other days should, in some of the states, be preferred to Sunday. Whether, in that event, Georgia must change or they must or no day whatever be protected, need not be anticipated. It is enough that,

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under present conditions, interstate commerce is subjected to no unreasonable delay by the Sunday law now in force. We have examined the case of *State v. Railroad Co.*, 24 W. Va. 783, and that of *Norfolk & W. R. Co. v. Com.* (Va.); 13 S. E. Rep. 340. We agree with the former, and disagree with the majority opinion in the latter. Judgment affirmed.*

Interstate commerce. Validity of state Sunday laws as applied to interstate commerce.—The precise question passed upon in the foregoing case does not appear to have been decided elsewhere, except in the two cases cited in the opinion, *State v. Railroad Co.*, 24 W. Va. 783; and *Norfolk & W. R. Co. v. Com.* 88 Va. 95; 13 S. E. Rep. 340. In the latter case the court says: "A statute which forbids the running of interstate freight trains between sunrise and sunset on Sunday is by its necessary operation, no matter what its professed object may be, a regulation of commerce. At all events, it is an obstruction to interstate commerce, which for the purposes of the present case amounts to the same thing; for, in any view it is an invasion of the exclusive domain of congress, and therefore void. To say that the state may, in the exercise of her police powers, enforce by statute the observance of the Sabbath, not as a religious duty, but as a day of rest, is no answer to the constitutional objection here raised. The validity of such legislation, when not in conflict with a higher law, is acknowledged by all, and its wisdom and propriety denied by none, certainly not by this court. But when, in a case like the present, it contravenes the Constitution of the United States, the latter must prevail, because it is 'the supreme law' in all matters relating to the regulation of interstate commerce. Such a statute, if passed by congress, so far as it concerns foreign or interstate commerce, would be valid, not however as an exercise of the police power, but as a regulation of commerce; and the reason which would make such legislation valid as an act of congress, makes it invalid as an act of a state legislature. As to the effect of the statute in question, if sustained, upon the commercial interests of the country, we need not stop to inquire. It is enough to say that, to the extent indicated, it is not valid. In *Henderson v. Mayor* (92 U. S. 259), it was decided that, whatever may be the nature and extent of the police power of the state, 'no definition of it and no urgency for its use, can authorize a state to exercise it in regard to a subject matter which has been confined exclusively to the discretion of congress by the constitution.' This principle was reaffirmed in *Leisy v. Hardin* (135 U. S. 100), where it is said that such a subject matter is not within the police power of a state, unless placed there by congressional action; and the observations of Mr. Justice Matthews in *Bowman v. Railway Co* (125 U. S. 465) were quoted in the opinion, to the effect that, in view of the commercial anarchy and confusion that would result from the diverse exertions of power by the several states of the union, it cannot be supposed that the constitution or congress have intended to limit the freedom of commercial intercourse among the people of the several states. The fact, if it be a fact, that the statute in question was not intended as a regulation of commerce, does not, we repeat, affect the case. There may be no

* Reported in 17 S. E. Rep. 1009.

purpose, it has been held, upon the part of a legislature, to violate the constitution, and yet a statute, enacted under the forms of law, may, by its necessary operation, injuriously affect rights secured by the constitution, in which case the statute, to that extent, must be declared void. *Brimmer v. Rebman*, 138 U. S. 78; 11 Sup. Ct. Rep. 213. This is merely stating in different form the proposition affirmed in the *Henderson* case, namely, that, in whatever language a statute may be framed, its constitutional validity must be determined by its natural and reasonable effect, a proposition that would seem to be incontrovertible."

2. State statute as to railroad tickets not applicable to interstate or foreign commerce.—The statute of Maine which makes a ticket for a passage on any railroad binding on the railroad company for six years from its date, with the right of the holder of the ticket to stop off at usual stopping places as often as he pleases during that period, cannot apply to a ticket purchased in Canada for a continuous passage on a particular day over the defendant's road from that province through portions of the states of Vermont and New Hampshire into Maine. Such an application of the statute would work an interference with both foreign and interstate commerce in the carriage of passengers. *La Farier v. Grand Trunk Ry. Co.*, 84 Me. 286; 24 Atl. Rep. 848.

3. Separation of white and colored passengers.—A state statute requiring officers of railway companies to assign passengers to coaches or compartments set aside for the use of the race to which they belong, is unconstitutional as applied to interstate passengers. *State, ex rel. v. Hicks*, 44 La. Ann. 770; 11 So. Rep. 74. See also *Louisville, etc., R. Co. v. Mississippi*, 133 U. S. 587; 1 Am. R. R. & Corp. Rep. 724.

4. Interstate commerce. Some miscellaneous decisions.—A message sent by telephone from one state into another is commerce between the states, and cannot be prohibited or regulated by injunction in either state against persons or corporations engaged in sending such messages, because they or it do not pay the taxes assessed against it by such state. *In re Pennsylvania Tel. Co.*, 48 N. J. Eq. 91; 20 Atl. Rep. 846. Acts of North Carolina 1891, c. 331, providing that persons selling seed in packages unmarked by the date when such seed were grown, except farmers selling seed in open bulk to other farmers or gardeners, shall be guilty of a misdemeanor, is unconstitutional and void under the interstate commerce clause of the constitution (article 1, § 8, cl. 3) with respect to the selling of seed in the original packages imported from another state. *In re Sanders*, 52 Fed. Rep. 802. As to licensing or taxing peddlers and agents, selling for manufacturers and dealers residing in other states, see *City of Bloomington v. Bourland*, 137 Ill. 534; 27 N. E. Rep. 692; *McClellan v. Pettigrew*, 44 La. Ann. 356; 10 So. Rep. 853.

SCHOPP ET AL. V. CITY OF ST. LOUIS ET AL.

(Supreme Court of Missouri, Division No. 1, June 19, 1893.)

1. MUNICIPAL CORPORATIONS. POWER TO LICENSE USE OF STREET FOR STANDS FOR MARKET PURPOSES. The power contained in the charter of St. Louis to establish, license and regulate market places, and to regulate the use

of streets does not authorize it to enact an ordinance for the licensing of spaces on a street in front of business houses for produce dealers' stands, such a use of the street being unlawful, and a nuisance to the abutting owners and to the public.

Wm. C. Marshall, Chas. S. Broadhead, and Leverett Bell, for appellants, Thos. B. Harvey, for respondents.

BLACK, C. J.—The city of St. Louis, by an ordinance enacted in due form of law, set apart that portion of Third and Broadway streets between Christy avenue and Howard street as a market “for farmers’ and other wagons bringing produce to market for sale,” and, by ordinance, gave the comptroller power to lease stands on and along that portion of the streets to such vendors of produce. The comptroller gave public notice that he would, on a given date, lease the stands for one year from the 1st April, 1890; and thereupon the plaintiffs brought this suit to enjoin the defendants from leasing stands in front of their property. The court awarded a perpetual injunction, as prayed for, and the defendants appealed. The evidence discloses the following further facts: Third and Broadway constitute one continuous street. The plaintiff Conrad Schopp owns a parcel of land, with a building thereon, fronting twenty feet on the west side of Third street, and the plaintiffs Lewedag & Co. are his tenants. The plaintiff, Jacob Schopp owns another parcel with buildings thereon, fronting on the east side of Third street, occupied by the plaintiffs the Jacob Schopp & Bros. Fruit & Produce Company, a corporation organized under the laws of this state. These tenants are engaged in the business of buying and selling, at wholesale and retail, fruits, vegetables, and other garden produce. They carry on a large business. The street in front of their buildings is from fifty-five to sixty feet wide, and has become a crowded thoroughfare for wagons and loaded vehicles because of cable railroads and the grades on the adjacent streets. For four years prior to the commencement of this suit, the city had annually leased to hucksters spaces in front of the property owned and occupied by the plaintiffs, about ten feet wide, and extending from the curb out into the street a distance of fifteen or seventeen feet. Spaces of ten to twenty feet wide were left between the spaces so leased. The hucksters and others leasing the spaces come in on all week days before daylight, and back their wagons in on the leased spaces up against the curb. They stand

on the sidewalk, and sell their produce from their wagons. As a rule, they remain until 8 or 9 o'clock in the forenoon, but it appears they often remain until 3 o'clock in the afternoon. The proof is clear to the effect that these market wagons materially interfere with the business carried on by the plaintiffs, by causing the street to become blockaded; and they render it difficult and often impossible for the plaintiffs to get their wagons up to the curb in front of their houses. Parts of these streets between Christy avenue and Howard street have been used for such market purposes since 1861, and perhaps longer, but the street in front of the buildings owned and occupied by the plaintiffs was not so used until four years before the commencement of this suit.

An abutting property owner has the same right to the use of the street that the public have, and, in addition thereto, he has rights which are special to himself, as the right of ingress and egress, and this right is a property right which he may protect. *Ferrenbach v. Turner*, 86 Mo. 416; *Glaessner v. Association*, 100 Mo. 508; 13 S. W. Rep. 707. An obstruction in a street or highway may be both a public and a private nuisance, and in such cases the private citizen who is specially injured may have injunctive relief. *Glaessner v. Association*, *supra*; *McDonald v. Newark*, 42 N. J. Eq. 136; 7 Atl. Rep. 855; *Elliott, Roads & S.* 496. That the plaintiffs here are specially injured admits of no doubt, but it is insisted by the defendants that the city of St. Louis has the right and power to lease out portions of the street surface to hucksters and others for market purposes, and whether the city has such right is the real question in this case.

The scheme and charter of the city of St. Louis gives to it, among others, the following powers: First, "to establish market places and meat shops, and license, regulate, sell, lease, abolish, or otherwise dispose of the same;" second, "to designate the place where such articles shall be sold," that is to say, "meat, poultry, fish, and vegetables;" and, third, "to regulate the use of streets." The powers conferred by the first and second of the above paragraphs are expressed in general words, and it cannot be said that they give the city any power to convert the public streets into market places. Says Dillon: "But power to a municipal corporation to establish markets and build market houses will not give the author-

ity to build on a public street. Such erections are nuisances, though made by the corporation, because the street, and the entire street, is for the use of the whole people. They are nuisances when built upon the streets, although sufficient space be left for the passage of vehicles and persons." Dill. Mun. Corp. (4th Ed.) § 383. And the text has the support of the following cases: *Wartman v. Philadelphia*, 33 Pa. St. 202-210; *State v. Mobile*, 5 Port. (Ala.) 279; *State v. Lavarack*, 34 N. J. Law, 201. The case last cited goes much further, and holds that the legislature has no power to authorize a market to be held in a public street of a city without providing for compensation to abutting property owners, as to which proposition we express no opinion in the present case. If the city has any power to lease out portions of the street surface to hucksters, it arises from the power "to regulate the use of streets." This power to regulate the use of streets is not confined to the regulation of travel thereon, but under it the city may allow gas, water, and sewer pipes to be laid therein, and may cause wells therein to be filled (*Ferrenbach v. Turner*, *supra*), and may permit the erection and maintenance of telephone poles thereon. *Julia Bldg. Ass'n v. Bell Telephone Co.*, 88 Mo. 258. All these uses are consistent with the uses for which streets are acquired or dedicated; but it does not follow from anything said in any of the cases just cited that the city may lease out portions of the streets for huckster's stands and stalls. A general power to regulate the use of streets cannot and ought not to be construed to give the city a right to create a nuisance in the streets, or to devote them, or any part thereof, to any purpose inconsistent with the right of the public or abutting property owners. The "public highways belong, from side to side and from end to end, to the public;" and "the public are entitled, not only to a free passage along the highway, but to a free passage along any portion of it not in the actual use of some other traveler," and the abutting property owner has the right to the free and unobstructed passage to and from his property. Said Lord Ellenborough in *Rex v. Cross*, 3 Camp 224: "And is there any doubt that if coaches, on the occasion of a route, wait an unreasonable length of time in the public street, and obstruct the transit of his majesty's subjects who wish to pass through it in carriages or on foot, the persons who cause and permit such coaches so to wait are guilty of a nuisance?" Teamsters may not unreasonably block

the public way, or stop their teams and vehicles for such a time and in such a place as to unreasonably interfere with the public travel. *Elliott, Roads & S.* 481, and cases cited. Other cases are more directly in point here. Thus, in *McDonald v. Newark*, 42 N. J. Eq. 137; 7 Atl. Rep. 855, the plaintiff owned and occupied a dwelling house fronting upon a public street. The city permitted hucksters of vegetables and other country produce to occupy the side of the street in front of plaintiff's house. The court held that this use of the street for a market place was both a public and a private nuisance, and awarded the plaintiff injunctive relief. See, also, *People v. Mayor, etc.*, 59 How. Pr. 278. In the case now in hand the city proposes to lease out spaces of the street in front of the business houses owned and occupied by the plaintiffs, such spaces to be used daily for the sale of garden products and the like, to the special injury of the plaintiffs. Such a use of the streets is unlawful, because inconsistent with the rights of the public and the plaintiffs. The judgment is therefore affirmed. All concur.*

Use of street for a market. Rights of abutting owners.—The use of a street for market purposes is entirely foreign to its legitimate uses as a highway, and such a use cannot be made without compensation to the abutting owners. In addition to the cases cited in the opinion of the principal case to this effect, is that of *Lutterloh v. Cedar Keys*, 15 Fla. 306. See also 6 Am. R. R. & Corp. Rep. 348, note 23; *Lewis Em. Dom.* § 182.

CENTRAL RAILROAD & BANKING CO. v. HASSELKUS ET AL.

(Supreme Court of Georgia. April 24, 1898.)

1. **COMMON CARRIERS. WHAT CONSTITUTES A THROUGH CONTRACT.** When the carrier gives the shipper a bill of lading which states that the goods received are to be transported by itself and connecting carriers to a certain point beyond the terminus of its line, and there delivered to a particular person, and the shipper at the same time pays, or agrees to pay, the freight for the whole route, this constitutes a contract for through shipment, for the performance of which, beyond as well as to the terminus of its own line, the contracting carrier is responsible.

2. **LIMITATIONS OF LIABILITY. ASSENT OF SHIPPER TO STIPULATIONS IN BILL OF LADING.** Mere acceptance of the bill of lading does not establish the shipper's assent to limitations of liability contained therein, and consequently stipulations in a through bill of lading by which the initial carrier seeks to confine

* Reported in 22 S. W. Rep. 898.

its liability to its own line, and which are not expressly assented to by the shipper, do not change the nature of the contract and are not binding upon him.

3. **STIPULATION AS TO NOTICE OF LOSS OR DAMAGE.** A stipulation in a bill of lading which exempts the carrier from liability unless notice is given of the damage within a specified time is one of the matters forbidden by section 2068 of the Code, and is not effectual without proof of assent thereto by the shipper.

4. **DAMAGE TO PERISHABLE GOODS. BURDEN OF PROOF ON CARRIER TO SHOW FREEDOM FROM NEGLIGENCE.** When goods, though perishable, or liable to rapidly deteriorate from internal causes, are damaged while in the hands of the carrier, the burden of proof is upon him to show either that he was free from negligence, or that, notwithstanding his negligence, the damage occurred without his fault; that is, that his negligence did not contribute to the damage.

5. **RULE AS TO TIME OF DELIVERY WHEN BILL OF LADING SILENT. EVIDENCE AND PLEADINGS.** The bills of lading being silent as to the time within which delivery was to be made at New York and Philadelphia, the law presumes it was to be done in a reasonable time, and parol evidence is not admissible to negative this presumption by showing that a definite and specific time was agreed upon either expressly or by implication.

6. The declaration alleging an undertaking to deliver in a specific time, but none to deliver in a reasonable time, evidence of what would be a reasonable time was inadmissible, and no recovery could be had under the declaration as it stands for failure to deliver in a reasonable time. If the necessary allegation is supplied by amendment, all the relevant facts and circumstances touching the particular shipment, as well as touching that class of shipments generally, may be shown to ascertain what length of time would be reasonable.

ACTION by Hasselkus & Stewart against the Central Railroad & Banking Company for damages to fruit by delay in transportation. Plaintiffs had judgment, and defendant brings error.

Hall & Hammond, for plaintiff in error, *Stewart & Daniel*, for defendants in error.

SIMMONS, J.—1. The action was for damages to fruit from delay in transportation. The plaintiffs recovered, and the defendant moved for a new trial, which was refused, and it excepted. The shipments were made from Griffin, Ga., on the defendant's line of railroad, under bills of lading issued by the defendant, which were headed "Central Railroad and Banking Company and Connections. Through Bill of Lading," and which stated that the fruit was received in apparent good order and condition, consigned to certain named parties in New York and Philadelphia, to be transported by the defendant, and connecting carriers, via Atlanta, to the station or wharf nearest to its ultimate destination.

The defendant at the same time took from the shippers a guaranty of the freight charges for the entire route. It was contended that the defendant was not liable, because there was no delay or damage on its own line, which ended at Atlanta, and because as to any delay or damage beyond its line it was released by the contracts of shipment, the bills of lading stipulating that "the liability of each carrier as to goods destined beyond its own route shall be terminated by proper delivery of them to the next succeeding carrier," and "in case of loss, detriment, or damage, or delay in the transportation thereof, imposing any liability hereunder, the carrier in whose actual custody they were at the time of such loss, damage, detriment, or delay, shall alone be responsible therefor." The bills of lading were signed only by the agent of the defendant, and it does not appear that these stipulations were expressly assented to on the part of the shippers. The Code (section 2068), declares that "a common carrier cannot limit his legal liability by any notice given, either by publication or by entry on receipts given or tickets sold. He may take an express contract, and will then be governed thereby." According to the decisions of this court in *Central R. Co. v. Dwight Manuf'g Co.* 75 Ga. 609, and *Falvey v. Railroad Co.*, 76 Ga. 597, when a common carrier gives the shipper a bill of lading which states that the goods received are to be transported by itself and connecting carriers to a certain point beyond the terminus of its line, and there delivered to a particular person, and the shipper at the same time pays such carrier, or agrees with it to pay the freight charges for the whole route, this constitutes a contract for through shipment, for the performance of which, beyond as well as to the terminus of its own line, the contracting carrier is responsible; and, under the first of these authorities, additional stipulations in the bill of lading by which the carrier seeks to confine its liability to its own line, and which are not expressly assented to by the shipper, do not change the nature of the contract, and are inoperative as limitations of the carrier's liability. Mere acceptance of the bill of lading does not establish the shipper's assent to stipulations of this kind. See, further, as to the character of the contract, *Railway Co. v. Pritchard*, 77 Ga. 412, 1 S. E. Rep. 261, and *Atlanta & W. P. R. Co., v. Texas Grate Co.* 81 Ga. 610, 9 S. E. Rep. 600. A different contract is not shown by evidence that the carrier was not interested

in the rate contracted for as to the part of the route beyond its own terminus, but received only its regular "local" rate from the connecting carrier. It follows that the court below did not err in declining to give in charge to the jury the requests set out in the 3d, 4th, and 5th grounds of the motion for a new trial.

2. Another stipulation under which the defendant claimed exemption from liability was the following: "All claims for damage to goods must be made, and the nature and extent thereof fully disclosed, in the presence of the agent of the carrier having the same in their custody, before they are removed from the station or wharf. Unless written demand for damages shall be made upon the carrier liable therefor, or upon the carrier which actually delivered the goods, within ten days after delivery all claims for damage shall be taken to have been waived, and no suit shall thereafter be maintained to recover the same." It was contended that the court erred in charging the jury that this was not binding upon the plaintiffs unless they "signed it, or understood and agreed to it in such manner as would indicate that it was clearly made a part of the contract." What we have said as to other stipulations in the bills of lading applies also to this. Under the decision of this court in *Express Co. v. Barnes*, 36 Ga. 532, it is an attempt to limit the legal liability of the carrier, and is not effectual without proof of assent thereto by the shipper.

3. When goods are damaged in the hands of the carrier, the burden of proof is upon it to show that it was free from negligence, or that, notwithstanding its negligence, the damage occurred without its fault; that is that its negligence did not contribute to the damage; and no exception to the rule arises from the fact that the goods are perishable, or liable to deteriorate rapidly from internal causes. In all cases the presumption of law is against the carrier. Code §§ 2066, 2064. As used in those sections, the word "loss" includes injury or damage to the goods. *Railroad Co. v. White*, 88 Ga. 813; 15 S. E. Rep. 802.

4. The office of a bill of lading is to embody the contract of carriage, as well as to evidence the receipt of the goods; and when the shipper accepts it without objection before the goods have been shipped, and permits the carrier to act upon it by proceeding with the shipment, it is to be presumed that he has accepted it as containing the contract, and that he has assented to its terms, ex-

cept, as we have seen, in so far as it undertakes to limit the general liability of the carrier. Incident to every such contract are certain matters which, when not expressed in the instrument, enter into and form a part of it by implication of law, and one of these is the time of performance. If no time is expressed, the instrument is not on that account to be regarded as incomplete, so as to admit proof of a distinct and separate agreement as to time. In such case the parties are presumed to have intended that the carrier's obligation as to the time of performance shall not extend beyond that imposed upon it by law in all undertakings for the transportation and delivery of goods, and which requires no more than that "the same be done without unreasonable delay." Code, § 2073. This implied agreement is as much a part of a bill of lading silent as to the time of performance as if expressed in it in so many words, and the rule which forbids the introduction of parol proof to vary the terms of a written instrument excludes evidence of a prior or contemporaneous parol agreement that the goods shall be delivered within a definite and specific time. "There is no rule of law better settled or more salutary in its application to contracts than that which precludes the admission of parol evidence to contradict or substantially vary the legal import of a written agreement." See *Martin v. Cole*, 104 U. S. 36, 38; *Naumberg v. Young*, 44 N. J. Law, 331; *Jones. Com. & Tr. Cont.* 308, 309, 193-195, 245 *et seq.* In *Hutchinson on Carriers* (Ed. 1891, §§ 126, 127a) it is said: "Except in the recital or acknowledgment of the receipt of goods and of their quality and condition when received, bills of lading are strictly written contracts between the parties, and come within the general rule which precludes the introduction of parol evidence to contradict or vary such contracts: * * * and not only is such evidence inadmissible to change or vary in any particular the express terms of the contract, but in these instruments, as in all other written contracts, there may be implied obligations as to which the contract may be entirely silent, but which result by necessary implication or construction from the very nature of the contract itself; and such implied obligations can no more be varied by verbal evidence than the express written stipulation of the parties." See, also, *Railroad Co. v. Wilson* (Ind. Sup.), 21 N. E. Rep. 341, and *Pennsylvania Co. v. Clark*, (Ind. App.), 27 N. E. Rep. 586. In the case last cited it was held

that parol proof was inadmissible to show an undertaking to ship on a certain train, the bill of lading being silent as to the time of shipment, and the effect of such evidence being to vary the implied agreement to ship within a reasonable time. "An agreement to do a thing within a definite time can never be identical in spirit or substance with an agreement to do it within a time not fixed, and which in law is to be merely a reasonable time; and, where the written contract is left in that indefinite shape, an agreement to make it definite is an agreement to alter it; and this cannot be done by any contemporaneous parol understanding." *Stange v. Wilson*, 17 Mich. 346; *Furniture etc., Co. v. Mead* (Minn.), 44 N. W. Rep. 306; *Stone v. Harmon*, 31 Minn. 512; 19 N. W. Rep. 88; *Driver v. Ford*, 90 Ill. 595. The responsibility imposed upon the carrier by the implied contract or duty to transport and deliver within a reasonable time is merely that of an ordinary bailee for hire, and renders the carrier liable only for such damages from delay as the bailee may have suffered by its negligence; but, if the contract is that this service shall be performed within a certain specified time, the carrier will be held to strict performance, and no degree of diligence will excuse the failure to perform within that time. In the present case the bills of lading were silent as to the time of transportation and delivery, but the plaintiffs, over objection, were permitted to introduce evidence to show a prior and contemporaneous parol agreement that the goods were to be shipped by a certain "fast freight schedule," which was also admitted in evidence over the defendant's objection, and which stated that fruit trains shipped under it would leave Atlanta at a certain hour, "arriving in New York before 12 o'clock the second night, in good time for early market of the third morning." Under the pleadings, the court erred in admitting this testimony. The plaintiffs having proven a written contract of carriage, a part of which was an implied stipulation that the carrier should be allowed a reasonable time for performance, they could not be permitted in this manner to substitute a warranty to deliver within a definite and specific time. If the understanding of the shippers was that the goods were to be delivered within a certain time, and it was intended that this should form a part of the contract, they should have seen to it that this understanding was embraced in the written instrument which the carrier tendered them as containing the

contract of carriage. But they accepted it as it stood, without objection, and permitted the goods to be shipped under it; and it is not pretended that the understanding as to delivery in a specified time was omitted by fraud or mistake. A bill of lading thus accepted and acted upon, though signed only by the carrier, has the same effect, as to being varied by parol, as if signed also by the shipper, and must be looked to as the final repository and sole evidence of the contract of carriage. 17 Amer. & Eng. Enc. Law, tit. "Parol," 482. And see *Railroad Co. v. Shomo* (Ga.; Oct. term, 1892); 16 S. E. Rep. 220, and authorities cited.

5. Had the plaintiff sued upon the implied contract or duty to deliver within a reasonable time, evidence as to the schedule might have been received, together with all other relevant facts and circumstances touching that particular shipment, as well as touching that class of shipments generally, to ascertain what length of time would be reasonable; but the contract alleged was a contract to deliver in a definite and specific time, and the plaintiffs must be held to the case stated in the declaration. Evidence as to what would be a reasonable time was therefore inadmissible, and no recovery could be had for failure to deliver in a reasonable time. See *Pennsylvania Co. v. Clark* (Ind. App.) 27 N. E. Rep. 586, and *Snow v. Railroad Co.*, 109 Ind. 422; 9 N. E. Rep. 702.

If the necessary allegation is supplied by amendment, evidence as to what would be a reasonable time will then be admissible. It follows that the court below erred in not granting a new trial. Judgment reversed.*

COMMON CARRIERS. VALIDITY OF STIPULATIONS REQUIRING NOTICE OF CLAIM FOR DAMAGES.

1. Validity of such stipulations generally.—Stipulations in carrier's contracts, requiring the shipper to present to the company or its agents, within a specified time, his claim for loss of, or injury to, the property shipped, are upheld when the requirements are reasonable. *Chicago & A. R. Co. v. Simms*, 18 Ill. App. 68; *Black v. Wabash, etc., R. Co.*, 111 Ill. 351; *U. S. Express Co. v. Harris*, 51 Ind. 121; *Goggin v. Kansas Pacific R. Co.*, 12 Kan. 416; *Sprague v. Missouri Pac. R. Co.*, 84 Kan. 847; *Atchison, T. & S. F. R. Co. v. Temple*, 47 Kan. 7; 27 Pac. Rep. 98; *Atchison, T. & S. F. R. Co. v. Dill*, 48 Kan. 210; 29 Pac. Rep. 148; *McKinney v. Louisville & N. R. Co.*, 87 Ky. 626; *Armstrong v. Chicago, etc., R. Co. (Minn.)*, 54 N. W. Rep. 1059; *Southern Express Co. v.*

* Reported in 17 S. E. Rep. 838.

Hunnicutt, 54 Miss. 566; Rice v. Kansas Pac. R. Co., 63 Mo. 314; Oxley v. St. Louis, etc., R. Co., 65 Mo. 629; Dawson v. St. Louis, etc., R. Co., 76 Mo. 514; Hess v. Missouri Pac. R. Co., 40 Mo. App. 202; Merrill v. Am. Express Co., 62 N. H. 514; Jennings v. Grand T. R. Co., 127 N. Y. 438; 5 Am. R. R. & Corp. Rep. 548; S. C., 52 Hun, 227; Smith v. Dinsmore, 9 Daly, 188; Hirshberg v. Dinsmore, 13 Daly, 429; Selby v. Wilmington & W. R. Co. (N. C.), 18 S. E. Rep. 88; Bennett v. Northern Pac. R. Co., 12 Or. 49; Weir v. Express Co., 5 Phila. 355; Southern Express Co. v. Glenn, 16 Lea, 472; Texas & P. R. Co. v. Adams, 78 Tex. 372; 14 S. W. Rep. 666; Missouri Pac. R. Co. v. Harris, 67 Tex. 166; Missouri Pac. R. Co. v. Cornwall, 70 Tex. 611; McCarty v. Gulf, etc., R. Co., 79 Tex. 33; 15 S. W. Rep. 164; Gulf, etc., R. Co. v. Gatewood, 79 Tex. 81; 14 S. W. Rep. 913; Galveston, etc., R. Co. v. Ball, 80 Tex. 602; 16 S. W. Rep. 441; Gulf, etc., R. Co. v. Trawick, 80 Tex. 270; 15 S. W. Rep. 568; Express Co. v. Caldwell, 21 Wall. 264; Lewis v. Great Western R. Co., 5 H. & N. 867. In next to the last case cited the court says: "A common carrier is always responsible for his negligence, no matter what his stipulations may be. But an agreement that in case of a failure by the carrier to deliver the goods, a claim shall be made by the bailor, or by the consignee, within a specified period, if that period be a reasonable one, is altogether of a different character. It contravenes no public policy. It excuses no negligence. It is perfectly consistent with holding the carrier to the fullest measure of good faith, of diligence, and of capacity, which the strictest rules of the common law ever required. And it is intrinsically just as applied to the present case. The defendants are an express company. We cannot close our eyes to the nature of their business. They carry small parcels, easily lost or mislaid, and not easily traced. They carry them in great numbers. Express companies are modern conveniences, and notoriously they are very largely employed. They may carry, they often do carry hundreds, even thousands of packages daily. If one be lost, or alleged to be lost, the difficulty of tracing it is increased by the fact that so many are carried, and it becomes greater the longer the search is delayed. If the bailor may delay giving notice to them of a loss, or making a claim indefinitely, they may not be able to trace the parcels bailed, and to recover them, if accidentally missent, or if they have in fact been properly delivered. With the bailor the bailment is a single transaction, of which he has full knowledge; with the bailee, it is one of a multitude. There is no hardship in requiring the bailee to give notice of the loss, if any, or make a claim for compensation within a reasonable time after he has delivered the parcel to the carrier. There is great hardship in requiring the carrier to account for the parcel long after that time, when he has had no notice of any failure of duty on his part, and when the lapse of time has made it difficult, if not impossible to ascertain the actual facts. For these reasons such limitations have been held valid in similar contracts, even when they seem to be less reasonable than in the contracts of common carriers."

Similar stipulations in the contracts of telegraph companies, and in insurance contracts, have been upheld as reasonable and valid. Hill v. Western Union Tel. Co., 8 Am. R. R. & Corp. Rep. 400 and note; Western Union Tel. Co. v. Culberson, 79 Tex. 65; 15 S. W. Rep. 219.

2. Reasonableness of such stipulations as to time, place, etc., and as applied to different sorts of shipments; application and construction generally.—In the following cases, relating to shipments of live stock, agreements were held valid which required the shipper to give notice in writing of any claim for damages, to some officer of the company, or its nearest station agent, before the stock was removed from the place of destination, or from the place of delivery thereof, and before the stock was mingled with other stock. *Goggin v. Kansas Pac. R. Co.* 12 Kan., 416; *Sprague v. Missouri Pac. R. Co.* 34 Kan. 347; *McKinney v. Louisville & N. R. Co.* 87 Ky. 626; *Selby v. Wilmington & W. R. Co. (N. C.)* 18 S. E. Rep. 88. In the first of these cases it is said that such an agreement would not be reasonable unless the owner or agent accompanies the stock. A stipulation requiring a claim in writing to be presented to the general freight agent in St. Louis, within five days after the stock was unloaded, was upheld in case of a shipment to Chicago, in *Black v. Wabash, etc., R. Co.*, 111 Ill., 351. The same limitation of five days was sustained in *C. & A. R. Co. v. Simms*, 18 Ill. App. 68, and *Dawson v. St. Louis, etc., R. Co.* 76 Mo. 514; and one of three days in *Oxley v. St. Louis, etc., R. Co.* 65 Mo. 629.

In case of express companies, ninety days from date of receipt of goods, was held reasonable in *Express Co. v. Caldwell*, 21 Wall. 264, and thirty days in *Southern Express Co. v. Glenn*, 16 La. 472. The same limit of thirty days was held unreasonable in *Southern Express Co. v. Caperton*, 44 Ala. 101; *Adams Express Co. v. Reagan*, 29 Ind. 21. In the latter case, the shipment was from Indiana to Savannah, Ga., during the war, and the notice was required to be given at the office of shipment. Thirty days from the time when the property ought to have been delivered was sustained in *Weir v. Express Co.*, 5 Phila. 855.

In *Jennings v. Grand Trunk Ry. Co.*, 127 N. Y. 438; 5 Am. R. R. & Corp. Rep. 548, potatoes were shipped in carload lots from points in Canada to East St. Louis. The bills of lading provided "that no claim for damages to, loss of or detention of any goods for which this company is accountable, shall be allowed unless notice in writing and particulars for the claim for said loss, damage or detention are given to station freight agent at or nearest the place of delivery within thirty-six hours after the goods in respect to which such claim is made are delivered." The nearest station to East St. Louis was Point Edward, Canada, across the river from Michigan. No notice was given and that fact was relied upon as a defense. The court held that the time limited was unreasonably short as applied to the circumstances of the case, and, therefore, that the stipulation did not apply. This conclusion does not appear to have been based upon the distance to the nearest station agent, but upon the amount and character of the property. Thus the court says: "The conclusion was permitted that, in view of the character and extent of the property, and the nature of the claim for damages which might and did arise, the time specified within which to give notice, with particulars, was quite unreasonable; and, therefore, and for that reason, the condition in that respect was inapplicable to the shipments in question; and the failure to give such notice was no bar to the remedy."

It has been held that, where the circumstances are such that the loss or damage are not, and cannot by the exercise of reasonable diligence, be discovered within the time limited, notice given within a reasonable time after the

discovery, will be a substantial compliance within the stipulation. *Western Ry. of Ala. v. Harwell*, 91 Ala. 340; 8 So. Rep. 649; S. C. 11 So. Rep. 781; *Memphis, etc., R. Co. v. Hollaway*, 9 Baxter, 188. In the first of these cases the court says: "Such conditions should not be strictly construed. The object is to prevent fraud on the carrier. When the shipper does not discover, and by ordinary diligence could not have discovered, the injury and its extent, before the animals are removed, notice thereof, within such reasonably short time after their removal as effectually secures the carrier from fraud, is a substantial and sufficient compliance with the condition. * * * The mules were delivered to plaintiff on the 29th day of December, and removed to his lot where the injury was discovered soon afterwards, and notice of the claim was given to the agent of defendant on the 4th day of January following. Whether plaintiff could, by ordinary diligence, have discovered the injury and the extent before removing the mules, and whether the notice of the claim was given within a reasonable time thereafter, are questions for the jury."

It would seem, however, that if the stipulation is one which is unreasonable as applied to the circumstances of the particular case, it does not apply at all and that, in such case, no notice is necessary. *Jennings v. Grand Trunk Ry. Co.* 5 Am. R. R. & Corp. Rep. 548; *Ormsby v. Railway Co.* 2 McCrary, 48; 4 Fed. Rep. 706.

In *Texas & P. R. Co. v. Adams*, 78 Tex. 372; 14 S. W. Rep. 666, it is held that the question whether the time limited is reasonable under the circumstances is one of fact for the jury and not of law for the court. "The bill of lading contained a stipulation to the effect that claims for damages must be presented to the delivery line within thirty-six hours after the arrival of the freight. The testimony showed that the plaintiff's residence was within a few hundred yards of the depot at which the freight was received, that she received it on Saturday afternoon, and did not open the trunk and box in which the goods were packed until the following Monday morning; and that she was sick during the interval. The court, we think, fairly and correctly submitted to the jury the question whether the stipulation with regard to the time within which the claim was required to be made was a reasonable time. It was proper to submit that issue to the jury, instead of its being decided as a question of law, by the court, as appellant contends it should have been."

In *U. S. Express Co. v. Harris*, 51 Ind. 121, the contract required notice in writing at the office of shipment within thirty days from the date of receipt. It was held valid as to time and invalid as to place and that notice might be given at any office of the delivering company.

In *Armstrong v. Chicago, M. & St. P. R. Co.* (Minn.) 54 N. W. Rep. 1059, the stipulation as to notice was held applicable to a default of the carrier as warehouseman, after the freight had reached its destination, that relation being properly incident to that of carrier. To same effect is *Zimmer v. New York Central, etc., R. Co.* (N. Y.) 33 N. E. Rep. 642.

The stipulation was held not to apply to the case of a draft received by an express company for collection, where it had collected the draft but failed to pay over the proceeds. *Bardwell v. American Express Co.* 35 Minn. 344. So where goods were sent C. O. D. with a stipulation that a claim for damages must be presented within thirty days from date of receipt, and also that if the

bill was not paid, the company should hold the goods for thirty days and then return to shipper, and the goods were not delivered or returned. *Smith v. Dinsmore*, 9 Daly, 188.

Where the stipulation was that "claims for loss or damage must be presented to the delivering line within thirty-six hours after the *arrival of the freight*," it was held that it did not apply in case of freight which did not arrive at all. *Galveston, etc., R. Co. v. Ball*, 80 Tex. 602; 16 S. W. Rep. 441.

3. Whether condition precedent or matter of defense. Burden of proof.—The burden of showing the reasonableness of the stipulation has been held to be upon the carrier. *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166; *Missouri Pac. R. Co. v. Cornwall*, 70 Tex. 611; *Ft. Worth, etc., R. Co. v. Greathouse*, 83 Tex. 104; 17 S. W. Rep. 834. *Gulf, etc., R. Co. v. Vaughan* (Texas Ct. of App.), 16 S. W. Rep. 775. In these cases the giving of the required notice was, by the terms of the contract, made a condition precedent to the right of recovery, and yet it was held that no burden rested on the plaintiff, either to show notice or excuse it. In *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104; 17 S. W. Rep. 834, one question was whether the plaintiff's petition was demurrable because it failed to aver notice. The contract containing the stipulation was made a part of the petition. The court held the petition sufficient without any averment of notice and says: "When such provisions of a carrier's contract are enforced, it is upon the assumption that such agreement is reasonable, when considered in the light of the subject-matter of the contract and the circumstances and surroundings of the parties. To prove that such conditions in a contract are reasonable is a burden resting upon the carrier, who must show by proper pleadings and evidence, the existence of facts that call for an enforcement of the condition. There were no pleadings and proof whatever upon this question coming from the carriers."

This would not seem to be a fair construction of the stipulation, where notice is expressly made a condition precedent. The contrary is held or implied in most of the cases that have been cited.

In *Wescott v. Fargo*, 61 N. Y. 542, the stipulation was that "this company will not be liable for any loss or damage, unless the claim therefor shall be made, in writing, within thirty days from the accruing of the cause of action, in a statement to which this receipt shall be annexed." It was held that the making of a claim in writing was not a condition precedent to recovery. "The clause in question," says the court, "assumes that the plaintiff has a 'cause of action,' which has already 'accrued' to him before the thirty days commenced to run. In that view the provision is in the nature of a statute of limitations, and should have been set up in the answer. As that was not done the defendant cannot avail himself of it."

4. Waiver of the condition.—Probably the same principles would apply to the question of the waiver of this condition in carriers' contracts, as to the waiver of similar conditions in insurance contracts. Of the latter there are numerous illustrations in these reports. See title, Insurance, in index. Where notice is given or claim made, but not in accordance with the requirements of the contract, and no objection is made to the form of the notice, and there is an absolute denial of liability or a promise to look up and adjust the matter, a strict compliance with the contract is waived. *Atchison, T. & S. F. R. Co. v.*

Temple, 47 Kan. 7; 27 Pac. Rep. 98; Rice v. Kansas Pacific R. Co., 63 Mo. 814; Hess v. Missouri Pacific R. Co., 40 Mo. App. 202; Merrill v. Am. Express Co., 62 N. H. 514; Bennett v. Northern Pac. Express Co., 12 Or. 49; Galveston, etc., R. Co. v. Ball, 80 Tex. 602; 16 S. W. Rep. 441.

In Rice v. Kansas Pac. R. Co., 63 Mo. 814, stock were shipped under a contract which stipulated that no claims for damage would be allowed, unless the same was made in writing before or at the time of unloading. The stock were injured in a derailment, but the train afterwards proceeded and arrived at its destination in the rain at midnight. The owner verbally notified the yard master and station agent of his claim for damages, and no objection was made to the form of the notice. With the consent of the company's agents, and on account of the unfitness of the company's stockyards, the cattle were unloaded forthwith, and taken to the plaintiff's farm, where they could have been examined by the company. Three days later he gave a written notice of his claim to an officer of the company, who made no objection to the notice, but insisted that the stock were not damaged. It was held that there had been a substantial compliance with the stipulation and also a waiver of strict compliance. The case of Atchison, etc., R. Co. v. Temple, 47 Kan. 7; 27 Pac. Rep. 98, is almost identical with the one just referred to.

Where one of five barrels of whiskey was missing, the promise of the agent of the company, that the missing barrel should be found and delivered in a few days, was held to be a waiver of a condition, that "claims for loss or damage must be presented to the delivering line within thirty-six hours after the arrival of the freight." Galveston, etc., R. Co. v. Ball, 80 Tex. 602; 16 S. W. Rep. 441.

5. Whether such a stipulation is a limitation of liability and so inapplicable to a loss or injury by negligence.—In most of the cases cited in the first section it is held that the stipulation in question is not a limitation of liability, and applies as well to a loss by negligence as to other causes. In some, this phase of this question is not noticed. The question is mooted but not decided in Missouri Pacific R. Co. v. Harris, 67 Tex. 168. The stipulation involved was as follows: "Said party of the second part further agrees that as a condition precedent to his right to recover any damages for any loss or injury to said stock, he will give notice in writing of his claim therefor to some officer of said party of the first part, or to its nearest station agent, before such stock is removed from the place of destination above mentioned, or from the place of the delivery of the same to the party of the second part, and before such stock is mingled with other stock."

Concerning this the court says: "Such a contract would seem necessarily to operate as a limitation on the carrier's common law liability, for under the rules furnished by that system of laws for the determination of the liability of a common carrier to a shipper for an injury done to the property of the latter while in course of transportation, a cause of action arises at once upon the infliction of the injury, and the requirement of an additional fact before a cause of action exists, and may be enforced, restricts or limits the right which the shipper would have at common law. In the absence of the special contract relied upon, when an unnecessary delay occurred and injury resulted therefrom, the shipper's cause of action was complete, and to require notice, as does

the special contract, as a condition precedent to the accruing of the cause of action, is but to say that the contract limits the liability of the carrier, in that it makes its liability depend on the existence of a fact not necessary to fix liability at common law." The case, however, was disposed of as to this branch, upon the ground that the burden was on the carrier to show by proper averments and proof the facts upon which the reasonableness of the stipulation depended, and that, as it had failed to do so, the stipulation was not available as a defense. Nor does the question appear to have been settled by subsequent decisions of the Supreme Court of Texas. *Texas & P. R. Co. v. Adams*, 78 Tex. 372; 14 S. W. Rep. 666; *Galveston, etc., R. Co. v. Ball*, 80 Tex. 602; 16 S. W. Rep. 601; *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104; 17 S. W. Rep. 834.

In *Missouri Pac. R. Co. v. Vanderverter*, 26 Neb. 222; 41 N. W. Rep. 998, it is doubted whether such a stipulation is valid, but the case is disposed of on other grounds. In *Wescott v. Fargo*, 68 Barb. 353; 6 Lans. 319, the stipulation is held to be a limitation of liability, and so not available as against a loss by negligence, unless a loss by negligence is expressly included. But in the upper court the case was disposed of as to this point the same as in the Texas cases referred to. 61 N. Y. 542. See also the case of *Atchison, etc., R. Co. v. Dill*, 48 Kan. 210; 29 Pac. Rep. 148, referred to in the next section at length.

6. The contract requiring notice must be fairly obtained and upon sufficient consideration or it will not be binding.—Whether or not, a stipulation requiring notice, is a contract for limited liability, it is certainly one for conditional liability. It imposes a condition unknown to the common-law and is not binding unless the consent of the shipper was freely and fairly obtained, and he had the option of shipping on the common-law terms as to liability. This is expressly held in *Atchison, etc., R. Co. v. Dill*, 48 Kan. 210; 29 Pac. Rep. 148. As this is an important question in the law of carriers we quote so much of the opinion as discusses it. "In May, 1887, Mark Dill and David W. Dill purchased, at Cedar Falls, Iowa, three stallions, and contracted in writing with the Chicago, Rock Island & Pac. Railroad Company to transport the stallions from Cedar Falls, Iowa, to Eskridge, in this state. Among these stallions was one English-shire horse, about four years old, and weighing from 1,500 to 1,600 pounds. The contract at Cedar Falls was for a through rate, and the horses were loaded in a car there, and shipped through to Eskridge in the same car, being transferred at Atchison, in this state, from the Chicago, Rock Island & Pacific Railroad to the Atchison, Topeka & Santa Fe Railroad. At Atchison, this contract was taken up, and a new one attempted to be executed in duplicate by the Atchison, Topeka & Santa Fe Railroad Company and Mark Dill, in charge of the stock. At Eskridge, freight was paid for the entire transportation, and the horses came through to that point in the same car in which they were shipped at Cedar Falls. When they arrived at Eskridge, the horse whose name was 'Blyth Uniform' had an acute attack of *laminitis*, or founder, an inflammation of the foot, and was in a very bad condition, hardly being able to stand on his feet. Mark Dill and David W. Dill claimed that this inflammation or disease was brought on by the negligence in handling of the car the horse was in, in the yards at Atchison and Topeka, after it was delivered to the Atchison Company. Mark Dill and David

W. Dill brought their action against the railroad company to recover \$3,500, their alleged damages. The cause was tried to a jury, and the jury returned a verdict for \$800. The railroad company complains of this judgment.

"The principal contention is whether the so-called written contract of May 19, 1887, alleged by the Atchison Company to have been entered into by Mark Dill, is binding, and therefore controls. That contract required the shipper to give notice in writing of his claim for damages for any injury to the stock shipped, to some officer or agent of the railroad company, before the stock was removed from the place of destination, or from the place of delivery, and before it was mingled with other stock. No such written notice was given. In reply to this contract, set forth in the answer, the plaintiff below alleged that he was compelled to sign the contract as a condition precedent to the transportation of his horse; that different rates or charges were not stated to him by the Atchison agent; that he was not given or offered any option between the different rates of the railroad company, and that he protested against signing the contract; and that, therefore, the contract was not binding, or of any force. In certain cases it has been decided by this court that a special contract for a notice in writing of damages or injuries, when reasonable, and fairly made, is binding upon the parties. *Goggin v. Railway Co.*, 12 Kan. 416; *Sprague v. Railway Co.* 34 Kan. 347, 8 Pac. Rep. 465; *Railway Co. v. Koch*, 47 Kan. 753, 28 Pac. Rep. 1013. As a general rule, and in the absence of fraud or imposition, a common carrier is answerable for the loss or injury to stock, if there is no special contract or acceptance, but, in all cases where the statute will permit it is just and reasonable that a contract requiring a written notice of the injury or damages claimed before the stock is removed from the place of destination, or mingled with other stock, when properly entered into, should be upheld. Such a contract, however, must be freely and fairly made with the railroad company, not exacted as a condition precedent of shipment. Railroad companies cannot arbitrarily fix any valuation on the property of the shipper, or arbitrarily demand or exact the execution of a contract limiting the common-law liability. *Railway Co. v. Nichols*, 9 Kan. 236. If a railroad company has two rates for the transportation of goods or stock,—one, if the goods or stock are carried under the common law liability; and the other, if carried under a limited or special contract,—the shipper must have real freedom of choice. He cannot be denied the right to have his goods carried by the carrier under its common-law liability; but if he desires, and if the statute permits, and public policy does not forbid, he may enter into a special contract with the carrier, limiting the common-law liability. *Railway Co. v. Reynolds*, 17 Kan. 251; *Railroad Co. v. Simpson*, 30 Kan. 645, 2 Pac. Rep. 821; *Express Co. v. Foley*, 46 Kan. 457, 26 Pac. Rep. 665; *Railroad Co. v. Lockwood* 17 Wall. 367; *Hart v. Railroad Co.* 112 U. S. 331, 5 Sup. Ct. Rep. 151. Plaintiff below testified that when he reached Atchison, in the forenoon of May 19th, he went at once to see the agent of the railroad company; that the agent told him to come back in the afternoon, and that he understood he was to get a way-bill; that his train went out at 4 p. m.; that he went back to the office of the agent, as requested, and the agent was not in; that about this time the train was ready to go, and the conductor asked him if he had a way-bill; that he told the conductor he had not, and that the conductor then said he could not get his stock out, and that

he had but a short time to get to the train; that he went over to the office of the agent, and obtained what he thought was a way-bill, but the agent told him he must sign his name; that before signing, he told him he did not want to sign his rights away, and the agent replied 'he would have to sign before his stock would go;' that nothing was said by the agent about different rates or charges; and that he hurriedly signed his name to the contract just as the train was to go out, but did not know what he signed. The plaintiff had already signed a contract with the Rock Island Railroad Company for the carrying of his horse to Eskridge, and therefore he very naturally might have supposed that no new contract would be imposed upon him. Upon this, and other like evidence, the court instructed the jury that 'it is claimed by the plaintiff, as an excuse for not giving the written notice, that the contract was not entered into by him voluntarily, but he was constrained to execute it by imposition. The mere fact that he approached the agent at Atchison, and signed that contract without knowing its contents, he being able to read, would not release him from his liability under the contract. * * * If the defendant's agents at Atchison, by any active conduct on their part, misdirected, misinformed, or mislead the plaintiff, and by reason thereof he was induced to sign the contract, when but for such imposition or misleading conduct he would not have done so, I think, for that reason, the contract would not be binding. The burden of proof is upon him to show that the contract under which this animal was shipped was improperly secured from him, and that he was induced to make it under such circumstances as I have named, before he can ask a jury to find he is not liable thereunder.' Under the pleadings and evidence, there was sufficient for the court to give this instruction, and therefore we do not think it was misleading or erroneous. *Railway Co. v. Reynolds*, 17 Kan, 251. If plaintiff below had signed and received the contract freely and fairly, without objection, he would, we suppose, be conclusively presumed to have assented to its conditions. *Express Co. v. Foley*, supra; *Merrill v. Express Co.* 62 N. H. 514; *Grace v. Adams*, 100 Mass. 505. If the agent of the railroad company had stated to him the different rates and charges for transporting stock, plaintiff below might have tendered a reasonable sum for the services and risk, and demanded transportation of his horse, according to the common-law liability of the company. The mere fact that a carrier's contract is not read or explained to a shipper is not sufficient to avoid it, especially where he receives a duplicate or copy. The rule concerning the liabilities of shippers on contracts of this kind, which they fail to read or understand, through their own negligence, is stated in *Hutch. Carr.* § 240; *Railroad Co. v. Weekly* (Ark.), 8 S. W. Rep. 137. But a common carrier cannot exact of a shipper his signature to a special contract, limiting the common-law liability as a condition precedent of shipping or transporting stock, because, in such a case, the carrier resorts to unfair means. A contract thus exacted is not freely and fairly entered into. In the *Reynolds* Case, after *Reynolds* had loaded his cattle in the car, the agent demanded that he sign a special contract, or have the cattle unloaded. The court said 'this was not right.' In this case, if the plaintiff's evidence is to be believed, and we do not find in the record any conflict therewith, his horses were in the car at Atchison, ready to go with the train to Eskridge, when the agent demanded 'that he sign a special con-

tract or his horses wouldn't go on that train.' The cases are therefore very similar; especially so, as one of the conditions of the contract referred to was to relieve the Atchison Company 'from the liability of a common carrier in the transportation of the stock.'"

7. Limiting time within which to bring suit.—Allied to the stipulation requiring notice of a claim for damages, is one limiting the time within which suit may be brought. A stipulation requiring suit to be brought within forty days after the damage occurs, was upheld in the following cases. *Gulf, etc., R. Co. v. Gatewood*, 79 Tex. 89; 14 S. W. Rep. 913; *Gulf, etc., R. Co. v. Trawick*, 80 Tex. 270; 15 S. W. Rep. 568; *McCarty v. Gulf, etc., R. Co.*, 79 Tex. 83; 15 S. W. Rep. 164; *Receivers v. Graves*, 16 S. W. Rep. 102 (Texas Ct. of App.).

KIRBY V. WESTERN UNION TEL. CO.

(Supreme Court of South Dakota. June 26, 1898.)

1. TELEGRAPH COMPANIES. ARE COMMON CARRIERS UNDER STATUTE. The statute law of this state (sections 3881-3910, Comp. Laws) makes a telegraph company, which offers to the public to carry telegraphic messages, a common carrier of such messages.

2. VALIDITY OF SUCH STATUTE. Such statutory provisions were not superseded nor repealed by section 11, art. 17, of the constitution of the state, imposing upon the legislature the duty of providing reasonable regulations, by general law, for giving effect to the right of a corporation organized for such purpose to construct and maintain lines of telegraph within the state.

3. DUTY TO CARRY UNDER COMMON LAW LIABILITY. HOW LIABILITY MAY BE RESTRICTED. While a common carrier may, in general, determine for himself the character and condition of what he will offer to and will carry, he cannot, by offering to carry under a qualified liability, constitute himself a common carrier with such liability only as he advertises to assume.

4. A common carrier is under a legal duty to accept and carry whatever is offered to him, at a reasonable time and place, of a kind that he undertakes or is accustomed to carry, subject to the full liability of a common carrier, unless such liability is restricted by a valid agreement between such carrier and his employer.

5. Such agreement, restricting the carrier's liability except as "to the rate of hire, the time, place, and manner of delivery," can only be manifested by the signature of the passenger, consignor, consignee, or person employing such carrier. Section 3888, Comp. Laws.

6. COMPANY CANNOT EXACT AN AGREEMENT TO RESTRICTED LIABILITY AS A CONDITION PRECEDENT TO RECEIVING MESSAGE. Such modification of the common carrier's liability depends upon, and results from, the agreement of the parties, and the carrier cannot legally exact such agreement as a condition precedent to receiving or carrying the offered freight or message.

7. COMPANY CANNOT THUS FORCE ASSENT TO SIXTY-DAY LIMITATION AS TO PRESENTING CLAIMS. As a common carrier, a telegraph company cannot

legally refuse to accept and transmit an offered message because the person offering will not sign an agreement that such carrier shall not be liable for damages in any case where the claim is not presented, in writing, within 60 days after the message is filed with the company for transmission. While such an agreement, when freely made, is binding, the carrier cannot exact it as a condition precedent to the discharge of his duty as such common carrier.

8. **SUBSEQUENT SENDING OF MESSAGE ON CONDITIONS IMPOSED BY COMPANY, NOT A WAIVER OF A PREVIOUS WRONGFUL REFUSAL BY COMPANY.** In the afternoon of January 4th, respondent offered appellant, for transmission, a message unconfessedly objectionable, except that it was not written on or attached to one of appellant's message forms. Respondent declined to sign or agree to the stipulations printed on such blank, and for that reason appellant refused to receive or send his message. Respondent then wrote a letter to the party to whom he desired to send the message, but still later, about 7 o'clock in the evening, went to the office of appellant, and sent a message upon one of its blanks, substantially like the one previously refused. *Held*, that appellant's refusal to send the first message constituted a refusal, within the meaning of section 3910, Comp. Laws, and that the sending of the second message was neither a cure of the wrong upon the part of appellant, nor a waiver of it on the part of respondent.

9. **PRACTICE. ALLOWING JURY TO SEPARATE.** Where, upon undisputed facts, no other verdict than the one returned could have been properly rendered, this court will not examine an alleged error in allowing the jury to separate temporarily without being admonished by the trial court not to converse among themselves, or with others, upon the subject of the trial, as it is evident that no prejudice resulted therefrom.

Bailey & Voorhees (George H. Fearons, of counsel), for appellant. *Joe Kirby* and *A. C. Boylan*, for respondent.


KELLAM, J.—On the 4th day of January 1892, the respondent offered to the appellant, at its office in the city of Sioux Falls, a written message, confessedly unobjectionable in matter, and requested that it be transmitted in the usual way to the party to whom it was addressed, and then and there offered to pay the usual compensation therefor. The message was written on ordinary white writing paper. The company declined to send the same unless written upon, or attached to, one of its message blanks. This the respondent refused to do unless the stipulations contained in such message blank should be first erased, so that he would not be bound thereby. Under these circumstances the message was refused by the company. Upon these facts, which appear to be undisputed, respondent brought an action against the appellant company to recover actual damages, and \$50 in addition thereto, under section 3910, Comp. Laws. The section reads as

follows: "Every person whose message is refused or postponed contrary to the provisions of this chapter, is entitled to recover from the carrier his actual damages, and fifty dollars in addition thereto." Upon the trial the respondent proved his actual damages, and had a verdict for 25 cents actual and \$50 statutory damages. Upon this verdict judgment was entered, a new trial refused, and the company appeals.

While other assignments of error, which will be hereafter noticed, were presented and argued, it is evident that the major question is the right of the appellant company to insist upon the message being received and sent subject to the stipulations contained in the message blank, and, if the person offering the message refuse to agree thereto, to decline to receive or transmit the same. If the law sustains the company's right to so insist, or to refuse the message, then, upon the facts in this case, respondent should not have recovered, for it is uncontradicted that the message was refused upon the distinct ground that the respondent positively declined to have it sent subject to the stipulations printed upon the message blank.

By the statute law of this state, (section 3881, Comp. Laws) "every one who offers to the public to carry persons, property, or messages is a common carrier of whatever he thus offers to carry." That the word "messages," as here used, was intended to include telegraphic messages, is evident from closely-following sections wherein a "carrier by telegraph" and a "carrier of messages by telegraph" are expressly named, and their duties as such defined. From the adoption of the Civil Code, in 1872, until the legislative session of 1873-74, the state of California had the same statutory provisions, but at the session named the above-quoted section was amended by inserting an express exception of "telegraphic messages." During the short time such original provision was there in force, we do not find any reported case in which it was considered. Prior to the adoption of such Code provision the supreme court of that state had held in *Parks v. Telegraph Co.*, 13 Cal. 422, that the defendant company, as a general telegraph company, was a common carrier; but the decisions of the courts have been with great unanimity against this view, and under the amended statutes it is now so held in California. *Hart v. Telegraph Co.*, 66 Cal. 579, 6 Pac. Rep. 637. Appellant, however, advances the pro-



position that these provisions of the old Civil Code, being the sections of the Compiled Laws, above cited, which declare telegraph companies to be common carriers, are superseded and repealed by, because inconsistent with, the constitution. This contention is founded largely upon section 11, art. 17, of the constitution: "Any association or corporation organized for the purpose, or any individual, shall have the right to construct and maintain lines of telegraph in this state, and to connect the same with other lines, and the legislature shall by general laws, of uniform operation, provide reasonable regulations to give effect to this section. No telegraph company shall consolidate with, or hold a controlling interest in the stock or bonds of, any other telegraph company owning a competing line, or acquire, by the purchase or otherwise, any competing line of telegraph." We think appellant claims too much for this section. It simply declares the right of an association, corporation, or individual to construct and maintain telegraph lines within this state, and to connect them with other lines, and then forbids the consolidation of competing lines. To carry into effect this general right to construct and maintain, and this prohibition against consolidation, the legislature is charged with the duty of providing suitable and reasonable laws and regulations, of uniform operation; regulations by and under which the right to construct and maintain may be used and exercised, and the prohibition of consolidation be enforced. We are not convinced that there is anything in the constitutional section which would forbid the legislature now, if it had never been done before, to impose upon telegraph companies the character and duties of common carriers. But, even if we understood this constitutional section to mean that the legislature should provide reasonable regulations for the conduct of the current business of telegraph companies, we should not think it had the retroactive effect of repealing former legislation, even though assailed as unreasonable. It is a general rule that neither constitutions nor statutes be so construed as to have a retroactive effect, unless such intention is clearly expressed. *Cutting v. Taylor*, (S. D.) 51 N. W. Rep. 949; *Cooley. Const. Lim.* pp. 62, 63; *Suth. St. Const.* §§ 463, 464; *Allbyer v. State*, 10 Ohio St. 589; *People v. Gardner*, 59 Barb. 189; *Ex parte Burke*, 59 Cal. 6. Although peculiar to our state, and the statute itself an exceptional one, I



think we must recognize its effect to be to make, in this jurisdiction, a telegraph company "a common carrier of whatever it thus offers to carry," and its duty to receive and transmit respondent's message must be tested by its rights and duties as a common carrier. An individual or corporation becomes a common carrier of just what it offers to carry. Its duty to the public springs from its offer to the public, and must be measured by it; so that the carrier who only offers to carry grain in canvas sacks cannot be required to carry grain in bulk. But while the carrier may thus, in general, determine for himself the character and condition of what he will carry, he cannot, by offering to carry for the public under a qualified liability, constitute himself a common carrier with such a liability, only, as he advertises to assume. As a common carrier it was appellant's legal duty, if able to do so, to accept and transmit respondent's message, if offered at a reasonable time and place, and if it was of a kind that it undertook or was accustomed to carry. Section 3882, Comp. Laws. The ability of appellant to receive and transmit the message; that it was offered at a reasonable time and place; and that the message itself, except as to the paper on which it was written, was of a kind that it was accustomed to carry, are not disputed.

The dominant question in this case, upon the merits, being whether the stipulations upon the message blank, or any of them, so far restricted appellant's liability as a common carrier as to justify respondent's refusal to consent to them, as a condition of having his message accepted and sent by appellant, we have thought it just to both parties to examine them severally, expressing our opinion upon each, so far as they are involved by the facts in this case. It is not claimed that either of the regulations or stipulations printed upon the message blank, and which respondent was required to assent to, offended against the rule of impartiality, which appellant, as a common carrier was bound to observe. Respondent, however, strenuously insists that the stipulation on the printed blank would, if assented to by him, have the effect of relieving the company from a liability imposed upon it by law, as a common carrier, and consequently he ought not to be compelled to agree to it, as a condition of having his message sent. The first matter objected to is as follows: "to guard against mistakes or delays, the sender of a message should order it repeated; that is,

telegraph back to the original office for comparison. For this, one-half the regular rate is charge, in addition." So much is only explanatory and advisory. Then follows: "It is agreed to between the sender of the following message, and the company, that said company shall not be liable for mistakes or delays in the transission or delivery, or for non-delivery, of any unrepeated message beyond fifty times the sum received for sending the same, unless specially insured; nor, in any case from unavoidable interruption in the working of its lines or for errors in cypher or obscure messages." Then follows the rates for sending insured messages. The order in which the rates, terms, and conditions are stated upon which the company would receive and transmit this message are, of course, not important. The essential thing to know is, did they tally with the duty of the company, as a common carrier. As such common carrier, it must insure, subject to the conditions and exceptions hereinafter noticed, the correct transmission of the message, for which it was entitled to a just and reasonable compensation. This, by the printed form, it offered to do, and stated the compensation. There is no claim that the compensation named for such service was not just and reasonable, and no such question was raised. The effect of the printed condition is the same as though the rate for an insured message—that is, the compensation for assuming all the duties of a common carrier—had been first stated, and then had followed an offer that for a less compensation it would send the message without incurring the full liability of a common carrier. It left the respondent free to exercise his election as to which offer he would accept, and determine for himself whether he would pay the company for insuring the correct transmission of the message, as a common carrier, or pay less, and assume a part of the risk himself. A common carrier may have two rates for the transportation of goods,—one covering its full common-law liability, the other, a special or limited liability,—so long as the shipper has a choice between them, at reasonable rates. He cannot be denied the right to have his goods carrier by the carrier under its common-law liability, but if he desires, and neither statute nor public policy forbid, he may enter into a special contract with the carrier, limiting its common-law liability. *Railroad Co. v. Dill*, 48 Kan. 210, 29 Pac. Rep. 148. It is matter of common knowledge



that the sending office marks upon the message form the rate or compensation paid, and thus is preserved, for the protection of both parties, some evidence, at least, of the election of the sender, and the resulting contract. It was entirely competent for the appellant to limit by special contract its obligation as a common carrier. Section 3886, Comp. Laws. The respondent was not obliged to make such a contract unless he chose. It was a matter of agreement between them. Parties who use telegraph lines are usually economical of their time. In most cases it is important that messages go at once. There is generally little time or opportunity for negotiation. As an expeditious and direct means of bringing both parties to a definite understanding, the company provides and furnishes to the public message forms containing its proposal of terms. The sender of a message may elect either. One of its offers covers its duty and liability as a common carrier. The sender may pay the tariff fixed for that service, and hold the company to its liability as a common carrier. We are unable to perceive how the offer of the company to qualify its full liability as a common carrier, and accept a less compensation thereto, if the sender so desires, can affect the rights of either. The offer only becomes binding when accepted and signed, and the sender is under no compulsion. He may pay for and get the full liability of a common carrier, or pay less, and get a limited liability. The causes or conditions named in the stipulation as excusing full performance of the company's obligation as a common carrier, are "unavoidable interruption in the working of its lines," and "errors in cypher or obscure messages." An "unavoidable interruption" is one that can not or could not be avoided; and while the courts have not been strictly at one in their views as to what, in modern times, should be regarded as equivalent to "the act of God or the public enemy," of the old authorities, our statute (section 3899) expressly makes "any irresistible superhuman cause" sufficient ground for avoiding the common carrier's liability, and section 3880 definitely fixes the measure of a telegraph company's duty in the transmission of messages to be the exercise of the "utmost diligence." We should be unwilling to rule, as a matter of law, particularly in view of the peculiar nature of telegraphic communication, that the utmost diligence could prevent, or successfully guard against, an "unavoidable interruption

in the working of its lines." It may sometimes be a question for the jury whether the facts in a particular case bring it within the rule, but, where the interruption is proved to be broadly unavoidable, we think the company would not be liable. Whether, strictly, as a common carrier, appellant could exact, as a condition of the acceptance and transmission of a cypher or obscurely written message, that the sender should release it from liability for an incorrect sending, we need not now determine, for the refused message was confessedly neither. It was further provided, as one of the stipulations to which respondent should consent, as a condition of sending his message that "no responsibility regarding messages attaches to the company until the same are presented and accepted at one of its transmitting offices." This would seem to be quite consistent with the provisions of our statute making the carrier's duty to commence when whatever is to be carried is offered "at a reasonable time and place;" but that, like the stipulation as to cypher and obscurely written messages, is not a question in this case, for it is undisputed that the message was offered at the proper office of the appellant, so that such stipulation could not restrict or affect appellant's liability to respondent in this case.

Another stipulation of the message blank was that "the company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission." Appellant here insists that this condition does not propose, nor is its effect, to limit in any way its responsibility as a common carrier, but is rather in the nature of a reasonable regulation, which appellant has a right to make, and which respondent, without any special contract on his part, was bound to observe, and cites cases in support of that view, notably that of *Express Co. v. Caldwell*, 21 Wall. 264. That case came before the court on plaintiff's demurrer to defendant's plea averring an express agreement upon the part of the plaintiff shipper that defendant should not be liable for loss or damage unless claim therefor was made within 90 days, and the question presented and decided was whether such an agreement, when made, was binding on the plaintiff. As to the necessity for an agreement in order to so qualify its liability, the court says: "Certainly, it ought not to be admitted that a common

carrier can be relieved from the full measure of that responsibility which ordinarily attends his occupation, without a clear and express stipulation to that effect obtained by him from his employer," thus treating the stipulation in question not as a reasonable regulation, which it was competent for the carrier to make, and binding on the shipper without his consent, but as an agreement depending upon the consent of both parties. The court held that such an agreement was not such an attempted restriction of the carrier's responsibilities as would be invalid, but being reasonable and fully assented to by both parties, it was binding; but that is not equivalent to saying that the carrier could compel the shipper to enter into such a contract, or require it as a condition of accepting his shipment. The very fact that such limitation of liability is the subject of agreement between the parties implies that either party may refuse to make such agreement. However such agreement may be proved elsewhere our statute provides that here it can only be manifested by the signature of the consignor, etc. Section 3888, Comp. Laws. In *Hartwell v. Express Co.*, 5 Dak. 463, 41 N. W. Rep. 732, our territorial supreme court rejected the defense of the carrier that the claim of loss upon which the action was founded was not presented to the company within the time specified in its receipt, upon the distinct ground that under the controlling statute just referred to there was no special contract so providing, or binding upon the parties. It was a rule or regulation of the company, and as such was printed in the receipt delivered to the consignor, but the court held that it did not operate to make the liability of the company different in any respect from what it otherwise would be, because, not being signed by the consignor, it was not a special contract, as required and defined by the statute. Now if, without such special contract, the liability of the carrier is not thus limited, and with it it is, can the carrier refuse the offering of a shipper of "whatever it is accustomed to carry," unless he will so contract to limit the carrier's liability? We think not. The carrier's duty is to receive and carry subject to the full measure of liability, unless restricted by mutual agreement; and except as to "rate of hire, the time, place and manner of delivery," such an agreement can only be shown by the signature of the shipper or sender. In *Tied. Lim.* pp. 256, 257, the learned author, after recognizing and

discussing the right of a common carrier to modify and restrict its liability by special agreement with its patron or employer, says: "But the contract must be freely and voluntarily made. The carrier cannot refuse to take goods for carriage under the common law liability if the consignor should refuse his assent to a limitation." To same effect, see *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344. Nor can a carrier require of a shipper a waiver of any of his rights as a condition precedent to receiving and carrying his freight. *Railroad Co. v. Fagan*, (Tex. Sup.) 9 S. W. Rep. 749. To sustain such a stipulation, where fairly made, is only to concede the right and power of the parties to make it, and comes far short of meaning that the carrier may exact the making of it as a condition precedent to the discharge of his duty as a common carrier. The statute was evidently intended to settle within this jurisdiction the question of how, and to what extent, the general liability of a common carrier may be limited; and by providing, as it does, that it can only be accomplished by a special agreement, it has deliberately left it with either party to consent, or to refuse to consent to such an agreement. The right to exercise such freedom of will by the respondent in this case would be denied and destroyed if he were compelled to consent under penalty of having his message refused. It has been suggested that respondent could found no right of action upon refusal of appellant to transmit his message unless he would agree to the stipulation, because, if made under such compulsion, it would not be enforceable against him, and therefore harmless; but such conclusion would be consistent with neither the duty of the appellant, nor the right of the respondent. This right and this duty were correlative, and each was a measure of the other. Whatever respondent had a right to have sent, it was appellant's duty to send. If it was respondent's right to have his message transmitted without agreeing to this condition, it was appellant's duty to transmit it without imposing such condition; and it could not justify a refusal to send on the ground that the stipulation sought to be exacted as a condition precedent might, by proper effort on his part, be avoided by respondent, because made under compulsion, or because void and nugatory, (if such statute should be held to apply to such a case,) under section 3582, Comp. Laws.

Following the line of these views, we are of the opinion that appellant could not, as a common carrier, legally require respondent to enter into the agreement which we have just discussed, and so that it could not legally refuse to receive and transmit his message because he declined to make such agreement. Of course this decision will not be understood as touching the question of the right of the company to make and enforce reasonable general regulations for the convenient and orderly transaction of its business, and for the proper protection of its interests, consistent with its duties as a common carrier. The appellant did not object to respondent's message because it was written on respondent's letter head, instead of on a message blank, and so inconvenient for filling or preservation in accordance with the practice of appellant. Respondent offered to use the blank, if appellant would erase the contract which he would otherwise be required to assent to in using it. The issue between the parties was distinctly as to the right of appellant to require assent to the stipulations restricting its liability as a common carrier, and this decision covers only that question. Its refusal to receive and transmit respondent's message, under the facts proved, constituted a refusal, within the meaning of section 3910, Comp. Laws. Such refusal gave respondent a cause of action, and his right of action was not, destroyed or affected by the fact that he afterwards sent substantially the same message. If to refuse the first message was an actionable wrong to respondent, persistence in it by appellant, to the extent of compelling respondent to submit to it, and to send another message on appellant's terms, did not cure or undo the first wrong. The testimony seems to show that respondent offered and attempted to have his message sent in the afternoon, between two and four o'clock; that it was refused, under the circumstances above recited: that he then wrote a letter to the party to whom he desired to send a message, but subsequently, and that evening, about seven o'clock, feeling doubtful of its reaching the party in time, he went to the office, and sent upon one of the appellant's blanks a message of very nearly the tenor of the message previously refused. There was nothing in this to waive the wrong of the refusal, or affect respondent's legal right to complain of it.

Finally, it is assigned as error that during the trial the jury was allowed to separate for a few moments without being admonished

by the court, as required by section 5051, Comp. Laws, not to converse among themselves, or with others, upon the subject of the trial. Whether, in any case, this fact alone would constitute reversible error, it is not now necessary to determine. The facts were not in dispute, and the law, as we understand it, applied to the conceded facts, plainly required the verdict which the jury rendered. Under such circumstances the appellant could not have been prejudiced. The judgment of the county court is affirmed. All the judges concurring. *

1. Telegraph companies. Right to limit liability for negligence.

—The authorities in regard to the right of a telegraph company to stipulate for exemption from the consequences of its negligence in regard to messages, are collected in the note to *Western Union Tel. Co. v. Short*, 3 Am. R. R. & Corp. Rep. 564. Besides the case just referred to, the following recent cases hold that such stipulations are against public policy and void. *Garrett v. Western Union Tel. Co.*, 4 Am. R. R. & Corp. Rep. 665; *Kemp v. Western Union Tel. Co.*, 2 Am. R. R. & Corp. Rep. 128; *Brown v. Postal Tel. Cable Co.*, 111 N. C. 187; 16 S. E. Rep. 179; *Wertz v. Western Union Tel. Co.*, 7 Utah, 446; 27 Pac. Rep. 172. See also as to common carriers, *Little Rock, etc., R. Co. v. Cravens*, 7 Am. R. R. & Corp. Rep. 270 and note; *Alair v. Northern Pac. R. Co.*, *post*.

2. Validity of stipulation requiring claim to be presented in writing within a specified time.—The usual stipulation in a telegraphic blank, that "the company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message," was held to be a limitation of liability and to be void in *Pacific Tel. Co. v. Underwood*, (Neb), 55 N. W. Rep. 1057. The reasons assigned are as follows: "(a) A telegraph company is a common carrier of intelligence for hire, bound to promptly and correctly transmit and deliver all messages intrusted to it, and cannot by contract exempt itself from liability for its own negligence. (b) The clause printed on the telegraph blank, to the effect that the telegraph company would not be liable for damages in any case unless the claim was presented in writing in sixty days, was and is unreasonable, and wholly without consideration, if viewed as a contract between the telegraph company and the sender of the message, and an attempt on the part of the telegraph company to enact for itself a statute of limitations. If it can make its liability for negligence depend on notice of claim being given in sixty days, it may make it six days. If liability can be made to depend upon the notice being in writing, it can limit it to pen and ink. The laws of this commonwealth are for the protection and government of corporations and individuals alike, and all citizens should transact their business with reference to these laws. The attempt, so often indulged in by insurance and telegraph companies, to prescribe for themselves a law, is not one that appeals to the judgment or commends itself to the conscience of this court. See, on this subject, *Tyler, Ullman & Co. v. W. U. Tel. Co.*, 60

* Reported in 55 N. W. Rep. 759.

Ill. 421; *W. U. Tel. Co. v. Crall*, (Kan.), 17 Pac. Rep. 309; *Gillis v. W. U. Tel. Co.*, (Vt.), 17 Atl. Rep. 786 and cases there cited; *Johnston v. W. U. Tel. Co.*, 33 Fed. Rep. 362; *W. U. Tel. Co. v. Longwill*, (N. M.), 21 Pac. Rep. 339.

(c) The instruction asked was violative of the statutes of the state, (section 12, c. 89a, Comp. St.): 'Any telegraph company engaged in the transmission of telegraphic dispatches is hereby declared to be liable for nondelivery of dispatches intrusted to its care, and for all mistakes in transmitting messages made by any person in its employ, and for all damages resulting from the failure to perform any other duty required by law; and any such telegraph company shall not be exempt from any such liability by reason of any clause, condition or agreement contained in its printed blanks.'"

The same stipulation was held valid in the following cases: "*Western Union Tel. Co. v. Dougherty*, 54 Ark. 221; 15 S. W. Rep. 468; *Lester v. Western Union Tel. Co.*, 84 Tex. 313; 19 S. W. Rep. 256. The authorities are collected in note to *Hill v. Western Union Tel. Co.*, 3 Am. R. R. & Corp. Rep. 400. As to the validity of similar stipulations in the contracts of carriers, see, *Central R. & B. Co. v. Hasselkus*, *post*.

The stipulation is held not to apply where the message is not written on one of the company's blanks. *Anderson v. Western Union Tel. Co.*, 84 Tex. 17; 19 S. W. Rep. 285. The notice will be sufficient if it apprises the company of the nature of the plaintiff's claim. *Western Union Tel. Co. v. Brown*, 84 Tex. 54; 19 S. W. Rep. 336.

3. Stipulation as to unrepeatd messages.—The authorities are conflicting as to the validity of a stipulation exempting the company from liability for mistake or delay, in case of unrepeatd messages. See 3 Am. R. R. & Corp. Rep. 572, note. The stipulation is held void as to mistakes or delay caused by negligence in the following cases: *Western Union Tel. Co. v. Short*, (Ark.), 3 Am. R. R. & Corp. Rep. 564; *Garrett v. Western Union Tel. Co.*, (Ind.), 4 Am. R. R. & Corp. Rep. 665; *Brown v. Postal Tel. Cable Co.*, 111 N. C. 187; 16 S. E. Rep. 179; *Wertz v. Western Union Tel. Co.*, 7 Utah, 446; 27 Pac. Rep. 172.

The stipulation is held not to apply to the sendee of a message and not to affect his right of action in *Tobin v. Western Union Tel. Co.*, 146 Penn. St. 375; 23 Atl. Rep. 324.

The stipulation does not protect the company from liability for damages which repetition could have no tendency to prevent. Where the company receives an important message, when its lines are down, and it fails to inform the sender of such fact, and fails to send by a competing line, which it might have done, the stipulation will be no defense. *Fleischner v. Pacific Postal Tel. Cable Co.*, 55 Fed. Rep. 788.

CITY OF ST. LOUIS V. HILL.

(Supreme Court of Missouri, Division No. 2. June 13, 1898.)

1. EMINENT DOMAIN. BUILDING LINES. WHAT IS PROPERTY. Property in any determinate object is composed of certain constituent elements, to-wit, the unrestricted right of use, enjoyment and disposal of that object.

avenue, of which the defendant was then and there the owner in fee, which premises were within the district covered by said Ordinance No. 16,450, in the city of St. Louis, did erect a certain dwelling house within the distance of forty feet, to wit within fifteen feet from the north line of said Forest Park boulevard, said house not conforming to the uniform building line of said Forest Park boulevard, as prescribed by said Ordinance No. 16,450. The defendant filed a written motion for discharge, upon the ground that the said Ordinance No. 16,450 is unconstitutional and void in that it is contrary to and in violation of sections 20, 21, and 30 of article 2 of the constitution of the state of Missouri. The St. Louis court of criminal correction, to which court the case had previously been appealed from said first district police court, overruled said motion, found the defendant guilty, and fined him \$500 and costs. Hence this appeal.

The ordinance heretofore quoted is bottomed on an enactment of the general assembly of this state, the first section of which is the following: "Section 1. All cities in Missouri having a population of three hundred thousand inhabitants or more, or which shall hereafter reach such population, are hereby authorized and empowered to establish by ordinance boulevards, and provide for maintaining the same, and may regulate the traffic thereon, and may exclude heavy driving thereon, or any kind of vehicle therefrom, and may exclude the institution and maintenance of any business avocation on the property fronting on such boulevard, and may establish a building line to which all buildings and structures thereon shall conform, and may convert existing streets into boulevards, and may levy a special tax on property fronting on said boulevard to light, sweep, and maintain the same, and the grass and trees thereon, or any part of said expenditures; and for the above purposes, or any of them, may lay out a district or districts in which said special tax shall be levied, and provide for the assessment of said special tax by assessing the same in favor of the city on the adjoining property fronting or bordering on the boulevards where such lighting, sweeping, and maintenance is to be had in the proportion that the linear feet of each lot fronting or bordering on the boulevard bears to the total number of linear feet of all property chargeable with the special tax aforesaid in the district so established, and may accept dedications of boulevards,

with conditions thereto attached, which shall be binding and conclusive: provided, however, that no ordinance on the above subjects, or any of them, shall be valid unless recommended by the board of public improvements of the city enacting the same." Laws 1891, p. 47.

Collins & Jamison and Rowell & Ferris, for appellant; *W. C. Marshall*, for respondent.

SHERWOOD, J.—(after stating the facts). As already disclosed by the record, the constitutionality of what is commonly known as the "Boulevard Laws" is called in question by this appeal. The provisions of the organic law cited by defendant as pertinent to this controversy are these: "Sec. 21. That private property shall not be taken or damaged for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be prescribed by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed, or the proprietary rights of the owner therein divested" "Sec. 30. That no person shall be deprived of life, liberty, or property without due process of law." Article 2, Const. 1875. It is urged on behalf of plaintiff that there has been no "taking" of private property under this law and ordinance, because the "title" to the property, and the right to use the same, are still in the defendant. This contention brings into prominence the true import of the word "property." The general result of various definitions of the term is that it is the exclusive right of any person to freely use, enjoy, and dispose of any determinate object, whether real or personal. 1 Bl. Comm. 138; 2 Aust. Jur. 817, 818; 19 Amer. & Eng. Enc. Law, 284, and cases cited; Lewis Em. Dom. §§ 57-59; *Eaton v. Railroad Co.*, 51 N. H. 504; *Thompson v. Improvement Co.*, 54 N. H. 545; *Wynehamer v. People*, 13 N. Y. 378. Sometimes the term is applied to the thing, itself, as to a horse or a tract of land. These things, however, though the subjects of property, are, when coupled with possession, but the indicia, the visible manifestations, of invisible rights, "the evidence of things not seen." Property, then, in a determinate object, is composed of certain constituent elements, to wit, the

unrestricted right of use, enjoyment, and disposal, of that object. It follows from this premise that anything which destroys or subverts any of the essential elements aforesaid is a taking or destruction *pro tanto* of property, though the possession and power of disposal of the land remain undisturbed, and though there be no actual or physical invasion of the *locus in quo*. Cooley. Const. Lim. (6th Ed.) 670; Wynehamer v. People 13 N. Y. loc. cit. 433, per Selden, J.; People v. Otis, 90 N. Y. loc. cit. 52, per Andrews, C. J. The use of a given object is the most essential and beneficial quality or attribute of property. Without it, all other elements which go to make up property would be of no effect. If the city were allowed to deprive the defendant of the use of his entire lot, it would leave in his hands but a barren and Barmecidal title; and what is true of property rights as an integer is true of each fractional portion. If plaintiff's theory be correct, then the city could pass and enforce an ordinance which would deprive defendant of the use of his entire lot, and still there would be no "taking," within the terms of section 21, art. 2, of the constitution, and consequently no right to compensation. The statement of such a position is sufficient to accomplish its utter repudiation.

The day before the ordinance went into operation defendant had the unquestionable right to build at will on his lot. The day afterwards he was as effectually prevented from building on the forty feet strip, except under peril of punishment, as if the city had built a wall around it and this, too, without any form of notice, any species of judicial inquiry, or any tender of compensation. If this is not a "taking" by mere arbitrary edict, it is difficult to express in words the meaning which should characterize the act of the city. A case has arisen in Pennsylvania strongly resemblant in some of its facts to the case at bar. There an act of assembly provided that whenever an owner of property on Chestnut street should rebuild, the building then to be erected should be set back five feet in the rear of the old line, thus widening the sidewalk five feet. The owner in that case contracted with a builder to tear down the old building and rebuild a new one on her lot. On application for a permit to rebuild the building inspectors and surveyors gave the new line as established by the law, and the city solicitor notified the owner that the front wall of the new building must be set back to the new line. The owner

conformed to the law, and built her building accordingly. She then claimed compensation for the strip of ground, when she was met with the assertion that, having voluntarily torn down her old front wall, and rebuilt according to the new line, the injury of which she complained was due to her own action, and therefore she could not recover; but the court answered: "By force of law, the instant the old building was torn down the city took part of the land for public use, and is liable to make compensation to the owner, the same as if it had been taken in any other mode." *City v. Linnard*, 97 Pa. St. 242. This case was subsequently follow in *Re Chestnut St.*, 118 Pa. St. 593, 12 Atl. Rep. 585, where it was again held that in such circumstances as aforesaid there was an appropriation by the city of the strip of ground to public use. In those cases it will be noted that there was a provision for compensation; here there is none. Other adjudicated cases and authorities have been cited on behalf of defendant, tending to the conclusion heretofore stated.

The premises considered, we hold that the "Boulevard Law" is unconstitutional, because it violates section 30, art. 2, of the constitution, in that it makes no provision for any proceeding in a court of law for condemning property, nor for notice to the owner, and therefore deprives any citizen interested along the given route of his property without due process of law. Nor does the ordinance in question make any such provision. *Lowry v. Rainwater*, 70 Mo. 152; *Rendering Co. v. Behr*, 77 Mo. 91, and cases cited; *Elliott, Roads & S.* 150; *City of Grand Rapids v. Powers*, 89 Mich. loc. cit. 103, 104; 50 N. W. Rep. 661; *City of Janesville v. Carpenter*, 77 Wis. 288; 46 N. W. Rep. 128. The "Boulevard Law" is also unconstitutional in that it makes no provision for compensation of those whose property is taken; nor is any such provision made in the ordinance by virtue of which defendant was arrested. Section 21, art. 2, of our constitution declares that private property shall not be taken or damaged for public use without just compensation. *Walther v. Warner*, 25 Mo. 277; *Provolt v. Railroad Co.*, 57 Mo. 261; *Evans v. Railroad Co.*, 64 Mo. 453.

It has been urged by counsel for the plaintiff city that in any event an owner of property along the boulevard has his remedy by action against the city by virtue of section 1821, Rev. St. 1889 which section is as follows: "In all cases where the city au-

thorities have graded or regraded or changed the grades or lines of any street or alley, or may hereafter grade or change the grade or any line of street or alley, without the consent of the owner, or where the compensation cannot be agreed upon, and do not, before the commencement of the work, institute proceedings, or have not instituted proceedings to have the damages ascertained and assessed, as provided in the six preceding sections, the owner shall be entitled to an action at law against the city, town, or village to ascertain and recover the amount of damages caused by such improvement." It will be observed that this section is not in conformity with section 21, art. 2, of the constitution, in that it allows property of the citizen to be taken before the compensation is "paid to the owner, or into court for the owner." Besides, the statutory section seems to be intended to apply only to cases where some actual improvement has been or shall be made prior to action brought by the owner. For reasons aforesaid, we reverse the judgment and, as it is apparent that the city has no standing in court, we will not remand the cause. All concur. *

Eminent domain. What constitutes a taking of property. Limiting use.—*Forster v. Scott*, 136 N. Y. 577; 32 N. E. Rep. 976, is a case closely analogous to the foregoing. In October, 1890, the proper public authorities filed a map or plan of a proposed street, which embraced the whole of the lot in controversy. The proceeding was in accordance with the statute which provided that "no compensation shall be allowed for any building, erection or construction which at any time subsequent to the filing of the maps, plans or profiles mentioned in section 672 of the act, may be built, erected or placed in part or in whole upon or through any street, avenue, road, public square or place exhibited upon such maps, plans or profiles." In June, 1891, the plaintiff agreed to sell and convey the lot in question to the defendant, and the question was whether the map or plan constituted an incumbrance upon the lot, or in other words, whether the restriction in the statute was valid and binding. The court held that it was not, and dispose of the question as follows: "Whenever a law deprives the owner of the beneficial use and free enjoyment of his property, or imposes restraints upon such use and enjoyment that materially affect its value, without legal process or compensation, it deprives him of his property, within the meaning of the constitution. All that is beneficial in property arises from its use and the fruits of that use, and whatever deprives a person of them deprives him of all that may be desirable or valuable in the title and possession. It is not necessary, in order to render a statute obnoxious to the restraints of the constitution, that it must, in terms or in effect, authorize an actual physical taking of the property or the thing itself, so long as it affects its free use and enjoyment, or the power of disposition at the will of the owner."

* Reported in 22 S. W. Rep. 861.

excursion. Among the party was Miss Kelly, and just before the train started at 10 o'clock, Mrs. Kelly, the mother of Miss Kelly, who had accompanied her to the cars, handed to Gavin, across the aisle, the sum of \$150, to be used in defraying the expenses of her daughter during the trip. Gavin deposited the roll of money without opening it in his trousers pocket, and, when he retired to his berth, (a lower one,) about 11 o'clock, he felt the roll of money in his pocket. He then rolled up his trousers, and placed them in the receptacle provided for clothes at the head of his berth. The next morning, when Gavin awoke, he felt for his trousers, and discovered that they were missing. Robinson, the colored porter, was called, and, in response to inquiries, told Gavin that he had found a pair of trousers on the floor that morning but, supposing they belonged to the section adjoining the head of Gavin's berth, he had placed them in that section. This section was occupied by two well-known and reputable citizens of Memphis. Robinson then brought the trousers to Gavin, but the money was missing. Gavin also discovered that a bunch of keys was missing from his pocket, but he found therein a sleeve or collar button, which was not his property. Robinson informed Gavin that the other porter, one Lind, had found a bunch of keys in the aisle during the night. Robinson then brought Lind to Gavin, and Lind handed him the bunch of keys, and also one or more baggage checks. Gavin, upon discovering the loss of the money, had the conductor called, and reported his loss. The conductor made some search, but failed to find the money. During the investigation it was reported to Gavin that the porter Lind had lost one of his sleeve buttons, and this fact, coupled with the finding of a strange sleeve button in Gavin's trousers pocket, at once fixed suspicion upon Lind. Gavin called Robinson and questioned him about the sleeve button, and was told by Robinson that Lind had asked him about his lost sleeve button. The car containing Gavin's party was occupied entirely by reputable citizens of Memphis, and many were also in the other sleepers. The train was a special train of five sleepers, and was to run from Memphis to Norfolk without change of cars, and all the sleepers were in charge of only one conductor. No new passengers came aboard at any place between Memphis and Chattanooga. The conductor testified in regard to the feasibility of one passenger robbing another behind the curtain that it

is possible to be done, but not probable, if the porter is on watch, and attending to his duty. The record shows that Lind went on watch about 12 o'clock, and remained on watch until 8 o'clock, when he was relieve by Robinson, who then continued his watch until half past six the same morning. Robinson testified that, if the porter was at his post and on watch, it would be impossible for any one passing along the aisle, or for a passenger occupying an adjoining berth, to abstract anything from Gavin's berth without attracting the party's attention ; that such a robbery was impossible without detection when the porter was on watch and doing his duty. The porter Lind testified that no one passing along the aisle could have stolen anything from a berth without being seen by him while on watch, but that a passenger in a berth might steal from an adjoining section at the head or foot. The circuit judge tried the case without the intervention of a jury, and, being of opinion that the money was stolen by porter Lind, rendered judgment against the company for \$150. The Pullman Palace Car Company appealed, and assigns errors.

The law is well settled that a sleeping car company is not a common carrier. They differ radically in the kind of service rendered the public. The contract of the sleeping-car company is to lodge the passenger, while that of the carrier is to carry him. Sleeping-car companies are not liable as inn-keepers for the loss or theft of articles from a guest, for the reason that the passenger on a sleeping-car retains the exclusive personal possession and control of his valuables. The company does not undertake to receive the property of the guest, but expressly declines to do so, and for this reason is absolved from the liability of an inn-keeper. It has been so difficult to define the precise legal status of this class of public servants, and the measure of their accountability that they have been facetiously characterized as "flying nondescripts." It is however, universally recognized by the courts that it is the duty of a sleeping car company to maintain a careful and continuous watch over the interior of the car while the berths are occupied by sleepers. If the property of the passenger is stolen by a fellow passenger, or by an intruder on the train in consequence of the failure of the company to maintain this careful and continuous watch, the company will be liable for its value *Carpenter v. Railroad Co.*, 124 N. Y. 58; 26 N. E. Rep. 277. It

money of Martin Kelly, who was not a passenger upon the cars." The gravamen of this suit is to recover the value of the property claimed to have been stolen by the employes of the company who were charged with the duty of preserving it. As already stated, this money came into the hands of M. Gavin as a depositary, to be used and expended by him in defraying the traveling expenses of Miss Kelly. It has been held in this state that an actual and exclusive possession by a party, even though it be by a wrongdoer, is sufficient to support an action of trespass against a mere stranger or wrongdoer, who has neither title to the possession in himself, nor authority from the legal owner. *Criner v. Pike*, 2 Head, 397. "Ordinarily," says the court in that case, "the party in possession is either the owner of the property, or answerable over to the owner; and in either case he is entitled, not only to damages for the taking, but also for the value of the property. This is the general rule. A defendant has been allowed to prove in mitigation of damages that the goods did not belong to the plaintiff, and that they have gone to the use of the true owner, either by being restored to him in specie, or taken upon legal process in payment of his debts, for in such case the plaintiff is not answerable over. But Mr. Sedgwick thinks the principle of these decisions has been carried quite far enough, * * * and that it will not do to permit acts of willful or wanton trespass to be excused by the defense of outstanding titles in third persons." See, also, *Logan v. Coal Co.*, 9 Heisk. 690, where it is held that "mere possession is a sufficient title upon which to maintain trespass against a mere wrongdoer." *Crawford v. Bynum*, 7 Yerg. 381. Miss Kelly having been placed in charge of Mr. Gavin, the latter had become the depositary of this money, for the purpose of defraying her current expenses, as they arose upon the journey. It has been held that members of the same family, traveling together, may carry each other's effects. *Dexter v. Railroad Co.*, 42 N. Y. 326; *Curtis v. Railroad Co.*, 74 N. Y. 116. We think that Miss Kelly, having been placed in charge of Mr. Gavin, was "*pro hac vice*," for the purposes of the journey, a member of his family, and that a gentleman in charge of ladies on such an occasion was their protector, and the proper custodian of their money and personal effects intrusted to him. In this view of the case, we think

it unnecessary to determine whether, at the time the theft was committed, the money was the property of Miss Kelly or her father, Martin Kelly. The proof shows the money was in the actual possession of Gavin, as its rightful depository. Other questions of minor importance were considered and decided orally.

Affirmed.*

1. Sleeping-car Companies. Liability for loss of money, valuables, etc.—The cases on this subject are collected in note to Pullman Palace-Car Co. v. Lowe (Neb.), 1 Am. R. R. Corp. Rep. 194. A sleeping-car company is bound to use reasonable care to protect only so much money carried by a passenger as is necessary and appropriate, in view of his circumstances and condition in life, for his wants and comforts during his contemplated journey, and is not liable if a sum of money carried for another purpose is stolen from him through the negligence of its servants, provided no special circumstances exist which impose on it a peculiar duty with reference to such money. Barrot v. Pullman Palace Car Co. 51 Fed. Rep. 796. In an action against a sleeping-car company for loss by a passenger of his coat while in his berth at night, the presumption of negligence on the part of defendant arising from such loss is rebutted by the uncontradicted evidence of the car porter that he was on duty, and engaged in watching the car, through the night, till after the loss. Pullman Palace Car Co. v. Freudenstein (Ct. App. Col.), 34 Pac. Rep. 578.

In Carpenter v. New York, etc., R. Co., 124 N. Y. 58; 26 N. E. Rep. 287, the plaintiff occupied a berth on a sleeping-car from New York to Boston. When he went to bed he placed his pocketbook in his inside vest pocket, and put the vest under the pillow next to the window. In the morning the money had been abstracted. The train left New York at 10.30 P. M. and arrived in Boston early the next morning. The train made eight stops. There was but one employe on the car who acted in the capacity of conductor, porter and boot-black. The court held that the company was only liable in case of negligence and that there was evidence of negligence sufficient to go to the jury and to justify a verdict against the company. The court says: "A corporation engaged in running sleeping-coaches, with sections separated from the aisle only by curtains, is bound to have an employe charged with the duty of carefully and continually watching the interior of the car while berths are occupied by sleepers. Car Co. v. Gardner, 3 Penny. 78. These cars are used by both sexes, of all ages, by the experienced and inexperienced, by the honest and dishonest, which is understood by the carriers, and though such companies are not insurers they must exercise vigilance to protect their sleeping customers from robbery. A traveler who pays for a berth is invited and has the right to sleep, and both parties to the contract know that he is to become powerless to defend his property from thieves, or his person from insult; and the company is bound to use a degree of care commensurate with the danger to which passengers are exposed. Considering the compensation received for such services, and the hazards to which unguarded and sleeping travelers are exposed, the rule of diligence above

* Reported in 28 S. W. Rep. 70.

from her seat and standing by the stove, it is not necessary for her to allege and prove necessity for her absence from her seat, contributory negligence being a matter of defense. *Northern Pacific R. Co. v. Hess*, 2 Wash. 833, 26 Pac. Rep. 866. The accident happened on a car on which it was understood that the passengers should look after their own berths, and were accordingly charged a low rate of fare. Soon after the accident, plaintiff wrote the company that she was injured by the carelessness of one of its employees. Shortly afterwards, in a letter to the company, she said that it was a newsboy who pushed the berth up. On the trial she testified that she thought it was a brakeman. Held, that there was sufficient evidence that the injury resulted by reason of the negligence of an agent of the company to sustain a verdict for plaintiff. **ANDERS, C. J., and STILES, J., dissenting.** *Ibid.*

BOSTON & ALBANY RAILROAD CO. V. CITY OF CAMBRIDGE.

(Supreme Judicial Court of Massachusetts. June 21, 1898.)

1. **EMINENT DOMAIN. LAYING OUT HIGHWAY OVER RAILROAD. MEASURE OF COMPENSATION.** Where a highway is laid out across a railroad the railroad company is entitled to compensation for the fair value of the land taken, subject to its use for railroad purposes.

2. **EXPENSE OF CONSTRUCTING AND MAINTAINING SAFETY APPLIANCES AS AN ELEMENT OF DAMAGES.** Under Pub. St., chap. 112, § 128, providing that, where a highway is laid out across a railroad, all expenses of, and incident to constructing and maintaining the way at such crossing, shall be borne by the county, city, town or other owner of the way, the railroad company is entitled to be compensated for the expenses of erecting and keeping in repair the appliances and structures required by law at the new crossing.

3. **EXPENSE OF OPERATING GATES AS AN ELEMENT OF DAMAGES.** Where gates are by law required at the crossing, the company is not entitled to compensation for the cost of operating the same, as such cost is properly chargeable to the ordinary expenses of operating the railroad.

4. The purpose of Laws 1838, chap. 151, § 1, providing that the city council of Cambridge shall have power to determine whether a certain railroad shall cross at grade the streets of the city, and what securities shall be provided and maintained by the railroad company at such crossings, was merely to rescind the provision of Laws 1848, chap. 296, § 2, that the railroad should not pass certain highways at grade, and did not authorize the city council to pass an ordinance permitting the railroad to cross the streets of the city on grade on the condition that, where streets were thereafter laid out across the road of the company, it would, at its own expense, set up and maintain gates at each crossing.

PROCEEDINGS by the Boston & Albany Railroad Company to assess the damages caused by the laying out of a street in the city of Cambridge across petitioner's road. A verdict was rendered fixing the damages, and upon the verdict, and the pro-

ceedings upon which it was based, the case was reported to the supreme court for its consideration. Judgment on verdict ordered.

Saml. Hoar, for petitioner. *C. J. McIntire*, for respondent.

BARKER, J.—This petition for the assessment of damages caused by the laying out of Front street, in Cambridge, across the petitioner's railroad, on July 20, 1888, under St. 1882, c. 155, and St. 1887, c. 282, comes before us upon a report from the superior court presenting questions raised by both parties.

1. Considering first the respondent's contention that the laying out of a highway across an existing railroad is not such an appropriation of individual property to public uses as to require that the owner shall receive a reasonable compensation therefor, the contrary doctrine is well settled in this commonwealth, and we see no occasion to re-examine at length the grounds upon which it has been placed. *Parker v. Railroad Co.*, 3 Cush. 107, 113; *Boston & L. R. Co v. Salem & L. R. Co.*, 2 Gray, 1; *Central Bridge v. Lowell*, 4 Gray, 474; *Old Colony & F. R. R. Co. v. Plymouth Co.*, 14 Gray, 155; *Grand Junction Railroad & Depot Co. v. Commissioners*, Id. 563; *Massachusetts Cent. R. Co. v. Boston, C. & F. R. Co.*, 121 Mass. 124. See, also, *Morris Canal & Banking Co. v. State*, 24 N. J. Law, 62, 70; *Philadelphia, W. & B. R. Co. v. Philadelphia*, 9 Phila. 563, 567; *Northern Cent. R. Co. v. Baltimore*, 46 Md. 425; *Detroit v. Detroit & H. Plank-Road Co.*, 48 Mich. 140; 5 N. W. Rep. 275; *Railway Co. v. Sharpe*, 38 Ohio St. 150; *Chicago & N. W. R. Co. v. Chicago* (Ill. Sup.), 29 N. E. Rep. 1109. As said by Judge Cooley in *Detroit v. Detroit & H. Plank-Road Co.*, *ubi supra*, "It cannot be necessary, at this day, to enter upon a discussion in denial of the right of the government to take from either individuals or corporations any property which they may rightfully have acquired." Evidence of the value of the land taken was relevant, and rightly admitted, and the ruling that the petitioner was entitled to recover for the fair value of its land taken, subject to its use for railroad purposes, was correct.

2. The other elements of damages allowed in the verdict may be classed together, as the expense of making and maintaining in repair the appliances and structures designed to make the cross-

ing safe and convenient for the traffic of the railroad and of the highway. It is the duty of the petitioner, under the statutes and the order of the board of railroad commissioners, to make and keep in repair the planking, paving, cattle guards, fences, sign-boards, and posts, and the gates; and there was also evidence tending to show that the gatehouse and fences were necessary in fact. Aside from the gates and the gatehouse, the expenses of making and maintaining all these structures and appliances were held in *Old Colony & F. R. Co. v. Plymouth Co.*, 14 Gray, 155, to be proper elements of damage; and the expenses of erecting and maintaining the gates—and of the gatehouse, if it was a necessary structure—are within the reason of that decision, and also of the rule given in *Massachusetts Cent. R. Co. v. Boston C. & F. R. Co.*, 121 Mass. 124, that a railroad corporation, across whose road a highway is laid, has the right "to recover damages for the injury occasioned to its title or right in the land occupied by its road taking into consideration any fences or structure upon the land, or changes upon its surface, absolutely required by law, or in fact necessary to be made by the corporation injured, in order to accommodate its own land to the new condition." This requires us to allow in favor of the petitioner all the elements included in the verdict, unless we decline to follow those decisions. In discussing that question we assume that all these expenses belong to the class which the legislature has the right to impose without consideration, either upon the railroad company, or upon the instrumentalities charged with building and repairing highways: and this irrespective of any reserved right to amend corporate charters, or to control mere agencies of the government. *Thorpe v. Railroad Co.*, 27 Vt. 140; *Munn v. Illinois*, 94 U. S. 113; *Beer Co. v. Massachusetts*, 97 U. S. 25; *Stone v. Mississippi*, 101 U. S. 814; *Butchers' Union, etc., Co. v. Crescent City, etc., Co.*, 111 U. S. 746; 4 Sup. Ct. Rep. 652; *Com. v. Intoxicating Liquors*, 140 Mass. 287; 3 N. E. Rep. 4; *Veazie v. Mayo*, 45 Me. 560; *Railroad Co. v. Deering*, 78 Me. 61; 2 Atl. Rep. 670; *Boston & M. R. Co. v. County Com'rs*, 79 Me. 386; 10 Atl. Rep. 113. How such burdens shall be distributed is a question of practical economics, within the province of legislation. Such expenses imposed upon railroad corporations, if charged to operating expenses, are defrayed in payments of fares and freights by those who use the

railroad, while, if imposed upon municipalities, they are paid out of the taxes. Which course places the burden where it ought to rest is fairly a legislative question. The fact that the safety of railroad traffic requires that the railroad company only shall be allowed to do work within the lines of its location has constantly tended to induce legislatures to impose upon railroad companies the duty of maintaining the roadway and all structures and appliances necessary for safety and convenience at such crossings, and in some states the courts have refused to allow the cost of making or maintaining such structures as an element of damages to be recovered by railroad corporations for the crossings of railroads by highways. In Maine, if a new way is laid across an existing railroad at grade, the statute directs that the expense of building and maintaining so much of the way as is within the limits of the railroad shall be borne by the railroad company. Rev. St. Me. 1883, c. 18, § 27; St. 1878, c. 48, § 1; St. 1883, c. 167, § 2. But at common law the crossing of a new way with one already in use must be made with the least possible injury to the old way, and whatever structures are necessary must be erected and maintained at the expense of the party making the new way, and if the old way cannot be crossed without damage the damage must be ascertained and paid. *Perley v. Chandler*, 6 Mass. 454; *Richardson v. Bigelow*, 15 Gray, 156; *Lowell v. Proprietors*, 104 Mass. 22; *King v. Kent*, 13 East, 220; *King v. Lindsey*, 14 East, 317, 320; *King v. Kerrison*, 3 Maule & S. 526, 532; *Morris Canal & Banking Co. v. State*, *ubi supra*; *Northern Cent. R. Co. v. Baltimore*, *ubi supra*.

A brief historical statement will show that the cases which we were asked to reconsider are, so far as they support the verdict rendered in the present cause, not only consonant to the principles of the common law, but that they are in accord with, and give a practical operation to the expressed will of the legislature. The earlier railroad charters of this commonwealth required railroad companies to construct and maintain the crossings of existing ways, canals and navigable waters, and were silent as to the laying out of new ways across railroads. See St. 1825 c. 183; St. 1829, cc. 25, 93, 94; St. 1830, c. 4; St. 1831, cc. 27, 55-57, 72; St. 1832, cc. 49, 97; St. 1833, cc. 109, 116, 118; St. 1835, c. 111. All but the first two contained a provision, since

1852. The other highway, for the laying out of which damages were claimed in that case, was laid on December 17, 1855, and before that date two additional general laws had been enacted. St. 1854, c. 401, authorized county commissioners, upon the petition of any party, for the better security of life, or convenience of travel, to alter the location and construction of gates at railroad crossings; and St. 1855, c. 350, required railroad companies, before constructing any crossing to obtain a decree of the county commissioners prescribing the alterations to be made, and to give security for the performance of the decree, and also empowered the commissioners to decree alterations and repairs to be made by the railroad company, at its own expense, at any crossing, and gave cities and towns the right to recover all damages, charges, and expenses incurred by reason of the neglect or refusal of a railroad company to erect or keep in repair structures ordered or necessary at a crossing. While both of the petitions referred to were pending, and before the hearing in this court, St. 1856, c. 245, authorized the stationing of flagmen at crossings, and St. 1857, c. 287, dealing explicitly with the subject of laying turnpike and other ways across existing railroads, was also enacted. This statute provided that no such way should be laid across a railroad, except by the county commissioners, or by their permission, and upon notice to the railroad company, and that "all the expenses arising from and incident to, the construction and maintaining of the way across the railroad," were to, "in all cases, be borne by the county, city, town, or corporation whose duty it is to build and maintain such way." By the same statute (section 6), if the way crossed the railroad on a level therewith, the railroad corporation was required, at its own expense, to so guard or protect the rails as to secure a safe and easy passage across the railroad; and if a subsequent alteration of the way, or additional safeguards, were required at the crossing, the commissioners could order the railroad company to establish them. The cases reported in 14 Gray, 155, were argued in January, 1859; and the decision was announced in the following December, just before the final enactment of the General Statutes. But the report of the revising commissioners, containing, in chapter 63, § 57, the provision that "all expenses of, and incident to, constructing and maintaining the road or way at such

without much strain, under the principles of the common law, and under the language of St. 1857, c. 287, and of its re-enactments, be considered as a fair element of damages. So, also, might the increased expense of ringing the bell, which was held not to be an element of damages in both of the former decisions; and so might the expense of maintaining a flagman, which was held inadmissible in the latter decision, both because the order to maintain the flagman might be changed, and because it was made since the time of the location, by relation to which the damages must be assessed. But all these things are, in a fair sense, part of the operation of the railroad, and are more properly chargeable to ordinary operating expenses than is the cost of erecting and keeping in repair the permanent structures and appliances at the crossing. They may well be classed with the inconveniences occasioned to the business of the railroad by the use of the crossing, which were held not to be proper elements of damages in *Massachusetts Cent. R. Co. v. Boston, C. & F. R. Co.* Upon the whole, we are not inclined to add this element of the cost of operation to those of the cost of construction and maintenance, and we hold that the cost of operating the gates is not an element in the damages to be assessed.

4. At the place where Front street now crosses the petitioner's railroad a railroad was first located and constructed by the Union Railroad Company, chartered by St. 1848, c. 296. By the second section of this charter it was provided that the railroad should not pass at the same level any highway or avenue to Boston. But by St. 1853, c. 151, § 1, the city council of the city of Cambridge was given full power to determine in what manner that railroad should be constructed across the streets within the city of Cambridge,—whether at grade or otherwise,—and what securities should be provided and maintained by the railroad company at such crossings. There was evidence tending to show that upon a petition of the directors of the Union Railroad Company, asking the city council of Cambridge to determine the manner of constructing the railroad across the streets in Cambridge, and what securities should be provided and maintained by the railroad company agreeably to St. 1853, c. 151, the city council, in the year 1854, permitted the railroad to cross the streets and avenues within the city upon condition that the company should provide, set up, and maintain, at

its own expense, gates, wherever the railroad crossed the streets and avenues leading to Boston, or streets which should thereafter be laid out within the city of Cambridge, and one or more men at each crossing to take charge of the gates, and to warn travelers of the approach of trains. By St. 1866, c. 278, the Boston & Worcester Railroad Corporation was authorized to purchase, among other railroad properties, the railroad, property rights, and franchises of the Union Railroad Company, and in default of such purchase within three months from May 28, 1866, to take with other property, the Union Railroad, with all the franchises, locations, lands, and material thereto belonging and appertaining, and to locate, construct, and maintain thereon a railroad, the termini and courses of which were specified in the statute. The purchase was not made, and, on November 22, 1866, the Boston & Worcester Railroad Corporation exercised its power to take the Union Railroad, and filed a location of the railroad which by the statute it was authorized to locate, construct, and maintain, and which is the railroad across which Front street was laid by the respondent. At the point where Front street crosses this railroad its location coincides with the location filed by the Union Railroad Company. After the taking and the filing of the location by the Boston & Worcester Railroad Corporation in 1866, that company accepted a conveyance, dated on May 19, 1869, of the Union Railroad, including all the franchises, locations, lands, and material thereto belonging and appertaining, which conveyance recited that it was intended not to waive, but to confirm, the title and rights acquired by the Boston & Worcester Railroad Corporation by its taking and location above stated. The petitioner is the successor of the Boston & Worcester Railroad Corporation, under the provisions of St. 1867, c. 270. The respondent contends that these circumstances preclude the petitioner from recovering damages for the laying out of Front street across its railroad. In deciding this question we do not find it necessary to determine the effect of the new location, made under St. 1866, c. 278. In our opinion the whole office of section 1, c. 151, St. 1853, was to rescind the prohibition of St. 1848, c. 296, § 2, against grade crossings, and to give to the city council the power, theretofore in the county commissioners under general laws, to fix the details of the crossings, and to determine what securities should be provided and maintained

by the railroad company. We see no reason to believe that it was intended, in case new streets should be laid out across the railroad, to provide that the damages to be awarded to the railroad company should be assessed otherwise than by the settled rule, or to abrogate, as to these crossings, the general statute which ordained that in such cases all expenses of and incident to constructing and maintaining the way at such crossing should be borne by the city.

5. We see no error either in the admission or rejection of evidence, or in the minor rulings, which, in the view we have taken of the case, should require a new trial. Judgment on the verdict.*

1. Eminent domain. Laying out highway over railroad track. Compensation.—The compensation which, under the constitution, a railroad company is entitled to receive when a highway is laid out over its right of way, is a vexed question in the courts. Some cases hold that the legislature may impose the entire expense of constructing and maintaining such crossings, upon the railroad company, and that in such a case it is only entitled to nominal damages. *Chicago & N. W. R. Co. v. Chicago*, (Ill.), 4 Am. R. R. & Corp. Rep., 697; *State v. Chicago, etc., R. Co.*, (Neb.), 2 Am. R. R. & Corp. Rep., 664; and see the cases cited in the notes to these cases.

A contrary view is maintained in *Kansas Central R. Co. v. Board of Commissioners*, 45 Kans. 716; 4 Am. R. R. & Corp. Rep. 688, which has been followed and approved in subsequent cases in the same state as follows: *Commissioners v. Kansas City, etc., R. Co.*, 46 Kans. 104; 26 Pac. Rep. 897, *Atchison, etc., R. Co. v. Board of Comrs.*, 48 Kans. 576; 29 Pac. Rep. 1084; *Chicago, etc., R. Co. v. Board of Comrs.*, 49 Kans. 763; 31 Pac. Rep. 736. The Michigan court supports the same view. *Comrs. of Parks & Boulevards v. Detroit, etc., R. Co.*, 93 Mich. 58; 52 N. W. Rep. 1083; *Comrs. of Parks & Boulevards v. Mich. Cent. R. Co.*, 90 Mich. 385; 51 N. W. Rep. 447; *Comrs. of Parks & Boulevards v. Detroit, etc., R. Co.*, 91 Mich. 291, 51 N. W. Rep. 934. In this class of cases it is held that the railroad company is entitled to compensation for the expense of constructing and maintaining the crossing, if that burden is cast upon it, and of such safety appliances as may be required by statute or rendered necessary by the exigencies of the case.

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(Supreme Court of Minnesota. April 27, 1893.)

COMMON CARRIERS. LIMITING LIABILITY TO A SPECIFIED AMOUNT. The owner of some horses delivered them to a common carrier for transportation under a contract, signed by him, stating the terms and conditions upon which

* Reported in 84 N. E. Rep. 382.

that in case of loss the carrier shall be liable only for the valuations stated in such agreement, to wit, for hogs, five dollars each; for, as was well said in the case of *Graves v. Railroad Co.*, 187 Mass. 88: 'If a person voluntarily represents and agrees that the goods delivered to a carrier are of a certain value, and the carrier is thereby induced to grant him a reduced rate of compensation for the carriage, such person ought to be barred by his representation and agreement; otherwise, he imposes upon the carrier the obligations of a contract different from that into which he has entered.' But we need not pursue the discussion, as the case of *Hart v. Railroad Co.*, 112 U. S. 331, 5 Sup. Ct. Rep. 151, in which the whole subject is fully discussed, and the authorities, both pro and con, are collated, fully sustains our view."

Tennessee.—*Louisville & N. R. Co. v. Sowell*, 90 Tenn. 17; 15 S. W. Rep. 887; *Starnes v. Louisville & N. R. Co.*, 19 S. W. Rep. 675. But see cases cited in next section.

Virginia.—*Richmond & D. R. Co. v. Payne*, 1 Am. R. R. & Corp. Rep. 475.

West Virginia.—*Zouch v. Chesapeake & O. Ry. Co.*, 36 W. Va. 584; 15 S. W. Rep. 185; compare *Brown v. Adams Express Co.*, 15 W. Va. 812.

Wisconsin.—*Bowman v. American express Co.*, 21 Wis. 152. But see *Black v. Goodrich Trans. Co.*, 55 Wis. 319.

United States.—In addition to *Hart v. Pennsylvania R. Co.*, 112 U. S. 331, there are the following cases in the lower courts: *The Hadji*, 18 Fed. Rep. 459; *The Lydian Monarch*, 23 Fed. Rep. 298; *Pease v. Quebec Steamship Co.*, 24 Fed. Rep. 285; *The Denmark*, 27 Fed. Rep. 141; *Earnest v. Express Co.*, 1 Woods, 578; *Muser v. American Express Co.*, 1 Fed. Rep. 832, S. C. 17 Blatch. 412; *Mather v. American Express Co.*, 9 Blas. 293. Compare cases cited in next section.

4. Cases which deny the validity of the limitation in question.—

The validity of stipulations which have the effect of limiting the liability of the carrier to less than the actual loss or damage, has been denied in the following cases.

Alabama.—*Mobile & O. R. Co. v. Hopkins*, 41 Ala. 496; *Southern Express Co. v. Crook*, 44 Ala. 468; *Ala. Great Southern R. Co. v. Little*, 71 Ala. 611; *Georgia Southern R. Co. v. Hughart*, 90 Ala. 86; 8 So. Rep. 623. But see cases cited in last section.

Colorado.—*Overland Mail & Express Co. v. Carroll*, 7 Colo. 43.

District of Columbia.—*Galt v. Adams Express Co.*, 4 McA. & Mack, 124. This case arose upon the usual stipulation in an express receipt, limiting the liability of the company to \$50, at which sum the property was valued unless otherwise expressed. Upon the validity of this stipulation the court says: "By tendering such a condition the carrier substantially says to the shipper: 'I am aware that the law would hold me responsible for the actual value of this article, although not disclosed to me, in case it should be lost or destroyed by means of my gross negligence; but I propose to exempt myself from so much of that liability as may exceed fifty dollars, by assuming that the actual damage to you, occasioned by my fault, is only fifty dollars; and this I propose to do by assuming that the article is worth only fifty dollars. This is not in good faith a valuation of property. Its legal effect, and, therefore, its legal intent is to restrict the measure of damages recoverable in case of negligence, and thus to

W. Rep. 887; *Starnes v. Louisville & N. R. Co.* (Tenn.), 19 S. W. Rep. 675. Contra: *Baughmann v. Louisville & N. R. Co.* (Ky.), 21 S. W. Rep. 757. In the latter case the court says: "We do not, in fact, see how, if it be admitted, as seems to be generally done, that a common carrier cannot obtain exemption by contract from the general consequences of his negligence, he can make a valid and enforceable contract by which he may be exempted from paying full value of goods of the shipper, destroyed or lost by his negligence; for, if public policy forbids enforcement of a contract of exemption, when loss is occasioned by negligence it logically requires full, not partial, measure of compensation to the owner of goods so lost or destroyed. It seems to us a common carrier cannot be injured or unfairly dealt with if simply required in the usual course of business to deliver the goods at the place of destination, or account to the shipper for their full value in case he, in violation of his contract, and by his own negligence or that of his servants, has lost or destroyed them; for if the goods are of high value, and the owner or bailor shall fix a high value upon them, it is always competent for the carrier or bailee to use care and expense, and then demand compensation for their carriage proportional to such value. The shipment of the horse in this case was in the usual course of business, and the bill of lading signed by the agent of plaintiffs contained none other than the ordinary stipulation. It is not alleged the plaintiffs or their agent deceived defendant as to the value of the horse; nor, though so argued by counsel, was the rate of freight lessened in consideration of the agreement of plaintiffs to accept less than actual value of their horse in case of loss or injury by negligence of defendant. The contract cannot be fairly construed to mean that the reduction of freight rate was made from such consideration or inducement, nor is it even so alleged in defendant's answer; but the reduction of the freight was manifestly made by reason of the shipment of a dozen or more horses, including that of plaintiffs, in the same car, under one contract and one consignment of the goods."

"One horse, *value \$100.*" Upheld in *Coupland v. Housatonic R. Co.*, 61 Conn. 531; 23 Atl. Rep. 870. "Description and *estimated value*, 12 cows at \$75 each." Upheld in *Hill v. Boston, etc., R. Co.*, 144 Mass. 284. "Now, in consideration that said company will transport, at said reduced prices, one horse *valued* at not exceeding \$100, * * * consigned to G. P. Coolidge at Antwerp, N. Y., it is * * * agreed that, in the event of the loss, death, or injury of the animals, or any of them, from causes which would make the carrier liable, such liability shall not, in any case, exceed an amount to be fixed according to the above valuation." Upheld in *Zimmer v. New York Central, etc., R. Co.* (N. Y.), 33 N. E. Rep. 642, " * * * on the condition that the carrier assumes a liability on the stock to the extent of the following *agreed valuation*: If horses or mules, not exceeding \$200 each; if cattle or cows, not exceeding \$75 each; if fat hogs or fat calves, not exceeding \$15 each; if sheep, lambs, stock hogs, or stock calves, not exceeding \$5 each; if a chartered car, on the stock and contents in same \$1,200 for the car load." Upheld in *Hart v. Pennsylvania R. Co.*, 112 U. S. 331; 8. C. 7 Fed. Rep. 680. "It is hereby further *agreed that the value of the live stock to be transported does not exceed the following mentioned sums*, to wit: each horse, \$100; each ox, \$50; each bull, \$50;

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valuation of \$100, or limitation of liability to that amount. The company a rate for ordinary horses not exceeding \$100 in value, and for horses of greater value it charged five per cent extra on the value over \$100. The horse sued was proved to have been worth from \$8,000 to \$12,000. The extra rate or smaller of these sums would have been \$400. This was equal to the charge twenty first-class passengers over the same route, carried without limitation of liability. Moreover, the five per cent extra fare was charged irrespective of distance, so that the rate would have been practically the same for ten miles for a thousand.

The question of the reasonableness of alternative rates, in cases of this kind is one which, so far, has received very little consideration, and one which presents many difficulties. It is a subject which awaits development.

7. A stipulation which in form and effect merely limits the amount for which the carrier shall be liable, is, as a contract, invalid against a loss or damage by negligence. Forms of stipulation which come within this principle.—If the proposition be conceded, as it is in nearly all the cases cited in this note, that a carrier cannot limit his liability for negligence, by contract or otherwise, there would seem to be no escape from the logic of the position that he can no more limit his liability for a part of the value of the thing carried, than he can for the whole of the value. Therefore a stipulation which, in terms, exempts the carrier from liability except for a specified sum, stands upon the same footing and is as objectionable, as one which exempts him from all liability whatever. The question is well presented in the case of *Moulton v. St. Paul, etc., R. Co.*, 81 Minn. 85. The shipper related to live-stock, and the agreement involved was "that, in case of total loss, the damage should in no case exceed the sum of \$100 per head, and in case of partial loss, damage should be measured in the same proportion." The stipulation was held invalid, as against negligence, and the court says: "The reason which forbid that a common carrier should, even by express contract, be absolved from liability for his own negligence, stand also in the way of any arbitrary preadjustment of the measure of damages, where the carrier is partially relieved from such liability. It would be absurd to say that the requirement of the law as to such responsibility of the carrier is absolute, and can be laid aside, even by the agreement of the parties, but that one-half or three-fourths of this burden, which the law compels the carrier to bear, may be laid aside, by means of a contract limiting the recovery of damages to one-half or one-fourth of the known value of the property. This would be mere evasion which would not be tolerated. Yet there is no reason why the contracting parties may not in good faith agree upon the value of the property presented for transportation, or fairly liquidate the damages recoverable in accordance with its supposed value. Such an agreement would not be an abrogation of the requirements of the law, but only the application of the law as it is by the parties themselves to the circumstances of the particular case. But that the requirements of the law be not evaded, and its purposes frustrated, contracts of this kind should be closely scrutinized.

"Upon the face of the contract under consideration, it is apparent that it was not the purpose of the parties to liquidate the damages recoverable with reference to the value of the property consigned to the carrier. Its provision

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On the other hand precisely similar stipulations were upheld in the following cases: South & North Ala. R. Co. v. Henlein, 52 Ala. 606; South & North R. Co. v. Henlein, 56 Ala. 388; Western Ry. of Ala. v. Harwell, 91 Ala. 8 So. Rep. 649; 11 So. Rep. 781; St. Louis, etc., R. Co. v. Lesser, 46 Ark. St. Louis, etc., R. Co. v. Weakly, 50 Ark. 397; Georgia R. & B. Co. v. (Ga.), 17 S. E. Rep. 934; Squier v. New York Central, etc., R. Co., 98 Mass. 239; Johnston v. Richmond & D. R. Co. (S. C.), 17 S. E. Rep. 512; Richmond & D. R. Co. v. Payne (Va.), 1 Am. R. R. & Corp. Rep. 475; Zouch v. Chesapeake & O. R. Co., 36 W. Va. 524; 15 S. E. Rep. 185. In some of these cases the stipulations sustained were even more objectionable in form than those which have just been quoted. We add two examples.

"And it is further agreed that in no case shall the said railway company be liable for a greater amount than fifty dollars per head of live stock being shipped." St. Louis, etc., R. Co. v. Weakly, 50 Ark. 397. " * * * in case of any loss or damage on its line, for which the party of the first party may be responsible under this contract, *such responsibility shall be and is hereby limited* to \$100 for each horse, mule, stallion or jack, \$50 for each cow, steer or bull, and \$20 for each other animal, *whether such loss or damage exceeds the sums or not.*" Zouch v. Chesapeake & O. R. Co., 36 W. Va. 524; 15 S. E. Rep. 185. Of similar import were the stipulations sustained in Johnston v. Richmond & D. R. Co. (S. C.), 17 S. E. Rep. 512, and Squier v. New York Central, etc., R. Co., 98 Mass. 239.

Of the cases here cited as sustaining this form of stipulation, most of them are incapable of some explanation which destroys their effect as authorities against the proposition we have placed at the head of this section. In Squier v. New York Central, etc., R. Co., 98 Mass. 239, the court says: "The stipulation that the carrier should not under any circumstances be held liable beyond the sum of two hundred dollars for injury to or loss of any single animal was a proper and lawful mode of securing a due proportion between the amount for which they might be responsible and the freight which they received, and of protecting themselves against extravagant and fanciful valuations." As a matter of fact, however, this was not necessary to the decision. Under other provisions of the contract it was held that the carrier was not liable in any sum, and the question of amount did not arise. Moreover, the contract was a New York contract and it was held that it was governed by New York Law.

In St. Louis, etc., R. Co. v. Weakley, 50 Ark. 397, and Georgia R. & B. Co. v. Reid (Ga.), 17 S. E. Rep. 934, the loss was not due to negligence and hence the only question was whether the contract was fairly made and on sufficient consideration.

In Western Ry. of Ala. v. Harwell, 91 Ala. 340; 8 So. W. Rep. 649; Richmond & D. R. Co. v. Payne (Va.), 1 Am. R. R. & Corp. Rep. 475, and Zouch v. Chesapeake & O. R. Co., 36 W. Va. 524, the courts assume that the stipulations in question are an agreement as to value and the cases are decided on that basis. In the first of these cases the court says: "Many cases hold that a carrier cannot limit his liability for negligence to a fixed sum. But the weight of authority seems to be that, where a valuation is agreed on by a contract fairly entered into between shipper and carrier, with the rate of freight based on the condition that the carrier assumes liability to the extent of the agreed valuation."

mostly be reconciled on the basis we have indicated. Recent cases are for the most part more careful to observe the distinctions we have pointed out, and prior cases are distinguished or qualified according to the facts of each case. It seems not improbable that there may be an ultimate general concurrence on the lines of distinction taken in most of the recent decisions and adopted in this note.

CITY OF POTWIN PLACE v. TOPEKA RAILWAY CO.

(Supreme Court of Kansas. June 10, 1898.)

1. **STREET RAILROADS. DUTY TO OPERATE LINES. MANDAMUS.** The performance of the duties which a street-railway company owes to the public to operate its lines in accordance with the provisions of a city ordinance under which its road was constructed may be enforced by *mandamus*.

2. **DUTIES AND LIABILITIES OF SECOND COMPANY AS GRANTEE OF PROPERTY AND FRANCHISES OF ORIGINAL COMPANY.** The city of Potwin Place granted to the T. R. T. Ry. Co. the right to construct a street railway on certain streets under an ordinance requiring a stated car service to be furnished by that company. Said company thereafter executed and delivered to defendant a deed by its terms granting, assigning and conveying to the defendant all franchises, powers, privileges and immunities possessed by it and its line of road in plaintiff city. Defendant accepted said deed, and operated said line for a time. Held, that the defendant thereby assumed the performance of the duties towards the public which rested before on the grantor.

3. **MANDAMUS. GRANTING OF WRIT DISCRETIONARY.** The granting of a writ of *mandamus* rests largely in the sound discretion of the court, and where it is asked to enforce the performance of a duty to the public the interests of all the people concerned will be regarded, and the writ will be so framed as will best preserve and enforce the rights of all parties.

THE city of Potwin Place, a city of the third class, brings this action against the Topeka Railway Company to compel it to operate its line of street railway in the city of Potwin Place, which it acquired by purchase from the Topeka Rapid Transit Railway Company by deed dated April 5, 1892. The line in question was constructed by the Topeka Rapid Transit Railway Company under Ordinance No. 25, passed by the mayor and councilmen of the city of Potwin Place on May 10, 1889, by which the last-named company was granted the right to construct and operate a road for a term of twenty years along Willow avenue from the east to the west line of the city, on Elmwood avenue from Laurel avenue south to the city limits, and on Laurel avenue from the east to the west line of the city. The line was constructed, soon after the

passage of said ordinance, along Willow and Elmwood avenues and on Laurel avenue from Elmwood east to Greenwood avenue and was operated by that company until the execution of the deed before mentioned. By this deed the rapid transit company conveyed to the Topeka company all its lines of road in the city of Topeka and this line in Potwin Place, which is particularly described in the deed. The defendant soon thereafter proceeded to operate the line of road located in the plaintiff city in connection with its lines in Topeka substantially as it had been before operated by the rapid transit company, and continued to so operate it up to about the 27th day of October, 1892, when it ceased to operate its line in Potwin Place, and it has failed to operate it ever since. Since the construction of said road the city of Potwin Place has been enlarged by the addition of what was before termed Auburndale, so that in territorial extent it has been more than doubled, and largely increased in population. Said Ordinance 25 gave the Topeka Rapid Transit Railway Company the right to construct its track, and operate by electricity its road. It provides that "the cars of said company shall at all times be entitled to the track, and the driver of every other vehicle on the track or by the side thereof shall turn such vehicle out when any car comes up, so as to leave the track unobstructed for the free passage of the cars," and requires that "said railway shall be so operated that a car shall pass any given point each way on the route at least every twenty minutes for twelve hours and at least once every thirty minutes for four hours, during that part of the day the road shall be operated." On the second of May, 1892, the defendant also acquired by deed the property of the Topeka City Railway Company, which was operating horse-car lines in Topeka, one of which extends into Auburndale, and is still operated by horse power. An alternative writ of mandamus was issued in this case on the 21st of November, 1892. The defendant filed a motion to quash, which was overruled at the April session, but no opinion was filed or announced on the legal questions involved. Afterwards the defendant answered, and the case was tried on its merits at the May session.

John W. Day, N. H. Loomis, and J. B. Larimer, for plaintiff.
Hosington, Smith & Dallas, for defendant.

ALLEN, J.—(after stating the acts). Various questions are discussed in the briefs, which it will be unnecessary for us to consider at length, because the defendant company asserts that it desires to operate a line of road through the city of Potwin Place, but it objects to operating the line already constructed, because it claims that a better route could be selected both for the company and for the people of Potwin Place. The defendant claims that it desires, and has asked the passage of an ordinance which will permit it to operate a line of road on a different route through the old city of Potwin Place through the addition of Auburndale in the direction of the insane asylum, and that it would be willing to construct and operate such route on what counsel term "any direct route," but the city and the company have failed to agree on a new line, and the defendant has refused to operate the old one. It is not seriously contended that the old line is unprofitable, but it is claimed that both the interests of the defendant and of the people of Potwin Place, and especially of those living in the western part, known as Auburndale, require that the electric car service should be extended to the neighborhood of the insane asylum, as the people of Auburndale are now dependant entirely upon a horse-car line for street-car facilities. The plaintiff asserts a willingness to grant defendant company a right to construct its line into Auburndale, as desired by the defendant, but insists on the operation of the line already constructed, and that no other route could be selected which would so well accommodate the people of the original city.

Defendant challenges the power of the court to compel it by mandamus to operate its road in Potwin Place. Counsel concedes that a railroad corporation can be compelled to perform its charter obligations, but insists that it is not bound by Ordinance No. 25, and that mainly for two reasons: First. That a city ordinance does not confer rights and create obligations which can be enforced by mandamus in the same manner as charter obligations can be; second, because it is not a party to the ordinance, and has not assumed the obligations imposed by its terms. Much is said in the briefs on the question whether the privileges granted to and the duties imposed on the rapid transit company by Ordinance 25 constitute a franchise, a contract, or a mere license; the defendant

contending that they amount to but a license. The term "franchise" seems to be used by the courts with much laxity. In *Morgan v. Louisiana*, 93 U. S. 223, it is said: "Much confusion of thought has arisen in this case and in similar cases from attaching a vague and undefined meaning to the term 'franchise.' It is often used as synonymous with 'rights, privileges, and immunities,' though of a personal and temporary character; so that, if any one of these exists, it is loosely termed a 'franchise,' and is supposed to pass upon a transfer of the franchises of the company. But the term must always be considered in connection with the corporation or property to which it is alleged to appertain. The franchises of a railroad corporation are rights or privileges which are essential to the operations of the corporation, and without which its road and works would be of little value; such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like." In *Sioux City St. Ry. Co. v. Sioux City*, 138 U. S. 107; 11 Sup. Ct. Rep. 226, it is said: "The right to operate the railway in the streets is a franchise obtained through the power given to the city by the state, but the state reserved the power to regulate such franchise and impose conditions upon it." In *Railway Co. v. Nave*, 38 Kan. 744; 17 Pac. Rep. 587, it was held: "Where a city authorizes a street-railway company to occupy a certain street and construct a railroad thereon at any time within six months after the authority is granted, the privilege so given must be used, if at all, before the expiration of the time limited," and that the permission so conferred was, until actually availed of by the company, a mere license, which the city could revoke. The question was not presented in that case as to the rights of the parties after the railway company had expended money on the faith of the ordinance in constructing its lines, and had obstructed the street by placing its roadbed and appliances for operating the same thereon. We think it unnecessary in this case to nicely discuss the use of words. The substantial question we have to decide is whether a duty which the law enjoins rests on the defendant, as a corporation, to operate its road. That corporations may be compelled by mandamus to perform their duties to the public is now well settled. *Merrill. Mand.* §§ 157-159; *Railway Co. v. Hall*, 91 U. S. 343; *State v. Hartford & N. H. R. Co.*, 29 Conn. 538; *Haugen v.*

Water Co.(Or.) 28 Pac. Rep. 244; Indianapolis & C. R. Co. v. State, 37 Ind. 489; State v. Missouri Pac. Ry. Co., 33 Kan. 176; 5 Pac. Rep. 772; Smalley v. Yates, 36 Kan. 519; 13 Pac. Rep. 845. By the provisions of the ordinance, the rapid transit company obtained the right to construct its roadway in the public streets, to maintain and operate it, to transport passengers and parcels by means of electrical power, to collect charges and tolls therefor. These privileges were not granted to the company solely for the company's benefit, but rather that the citizens of the plaintiff city might have the benefit of an improved mode of travel,—that they might enjoy the benefits of one of the inventions of the age. By the terms of the ordinance the rights of the company were defined, and their duties to the public declared. The company accepted the provisions of the ordinance, and constructed its road under the leave thereby obtained. May it now disregard the obligations imposed on it by its terms? May it still incumber the streets of the city with its track, poles, wires, etc., and refuse to operate its road? It is said that the performance of only charter obligations can be compelled by mandamus,—that the charter of the defendant company does not require it to operate a line of railway in the city of Potwin Place. The obligations imposed on a railroad company are seldom defined with any degree of particularity by the terms of its charter, and this is especially true of street railways, and in this state, where all corporations are formed under general laws. It is true that the company gets its charter under the general law of the state, but the rights conferred by the charter of a street railway company incorporated for the purpose of operating a street railroad in the city of Topeka is but a barren grant until it is given form and force by an ordinance of the city permitting it to enter on the streets and construct and operate its lines. From the state directly it derives but the bare power to exist. Its vital force comes from the state indeed, but through the subordinate agency of the city council, which is given power by the legislature to fix the terms and conditions on which it may actually carry out the purposes of its creation.

Now, while it is true that both the rapid transit railway company and the defendant, having obtained charters from the state, and also ordinances from the mayor and council of the city of Topeka granting them the privilege of operating within the city of To-

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and laden with the responsibilities declared in the ordinance. defendant stands in neither better nor worse position in relation to the people of Potwin Place than did the rapid transit company. It is not pretended that its charter is not broad enough to warrant its operating this line of road. On the contrary, it affirms its desire to further extend its lines within the limits of plaintiff. It is conceded that the granting of a writ of mandamus rests in what is in the discretion of the court. In this particular case it should be issued only in the interest of the public, and to enforce the performance of a public duty by the defendant. The defendant contends that it will be impracticable to operate the entire line constructed in Potwin Place, and also to operate an extension through Auburndale to the asylum, in a manner satisfactory to the public. We, of course, have no right to direct the plaintiff to grant the defendant company any new privileges, but, in enforcing plaintiff's rights we ought to take into consideration all of the circumstances, and the needs of all its citizens. The portion of the route which the defendant especially objects to operating is that part on Elmwood avenue from Park to Laurel avenue, and the two blocks on Laurel avenue. The two blocks on Laurel avenue extend east from Elmwood avenue, and therefore lie in the opposite direction from the Auburndale addition. In order to operate the two blocks in connection with an extension through Auburndale towards the asylum it would be necessary either to double the service on Laurel avenue each trip, or to alternate cars on each trip. The evidence leaves us in doubt as to whether this could be done in a manner satisfactory to the people, and, as we are unwilling to make any order which is likely to prevent adequate service to be rendered to the people of the Auburndale addition we think, in the exercise of our discretion, we should not peremptorily require the operation of the two blocks on Laurel avenue.

It appears that the present terminus of the defendant's open electric line is at the corner of Sixth and West streets; that the defendant company has the right, under the ordinance passed by the mayor and council of the city of Topeka, to construct its lines on any of the streets of Topeka. It is therefore entirely practicable for the defendant to connect its lines now in operation with the east end of the Willow avenue line, and we think it should be required to operate the Willow avenue and Elmwood avenue lines in accordance with

terms of the ordinance. A peremptory writ will be awarded requiring the defendant to operate its line along Willow avenue, and on Elmwood avenue, from the south end thereof to Laurel avenue, and judgment will be rendered against the defendant for costs. All the justices concurring.*

1. Street railroads. Mandamus to compel construction or operation of road.—A street-railway company was authorized to extend its lines upon certain conditions, which were agreed to by it, among which were the following: "That said tracks shall be laid and in actual operation from Western avenue to the western line of Douglas Park on or before the first day of June, 1891, and from the western line of Douglas Park to Lawndale, as soon as the same can be constructed, operated and kept in repair without actual loss." The road was constructed and put in operation to Douglas Park within the time specified. To a petition for a *mandamus* to compel the company to construct and operate the road from Douglas Park to Lawndale, the company, among other things, answered that the road could not be constructed, kept in repair and operated without actual loss. To this answer a demurrer was filed. The court expressed a doubt whether *mandamus* was a proper remedy in any event, but decided the case upon the ground that, by the terms of the ordinance, the company was not bound to construct and operate the road until it could be done without loss, and that the demurrer admitted the averment of the answer upon this point to be true. *People v. West Division R. Co.*, 118 Ill. 118. A street-railway company was authorized by its charter to construct a road upon certain streets in Philadelphia. It was held that the words of the charter were imperative and that the company could not construct a part of the road authorized and abandon the remainder. *Martin v. Second & Third Str. Pass. R. Co.*, 8 Phila. 816. A statute of Connecticut provided that no railroad company should abandon any depot or station on its road, after such depot or station had been established for twelve months, except by approval of the railroad commissioners after public notice and a hearing had. It was held that where a railroad company had abandoned a station without such approval, a *mandamus* would lie to compel it to re-establish the same. *State v. New Haven, etc., R. Co.*, 37 Conn. 158.

In *State v. Omaha Horse R. Co.*, 19 Neb. 149, it appears that the lower court granted a *mandamus* to compel the company to run cars over a certain portion of its line. The only question passed upon by the supreme court was one relating to a *supersedeas* bond.

On the duty of railroad companies to establish, maintain or restore stations, see *Mobile & Ohio R. Co. v. People*, 2 Am. R. R. & Corp. Rep. 476; *Northern Pac. R. Co. v. Washington*, 5 Am. R. R. & Corp. Rep. 858; *Conger v. New York, etc., R. Co.*, 2 Am. R. R. & Corp. Rep. 190; *Florida Central R. Co. v. State*, *ante*, p. 94. And on the duty generally of corporations to perform their duties to the public and the enforcement of such duty see, also, *Central Union Tel. Co. v. State*, 2 Am. R. R. & Corp. Rep. 406; *Haugen v. Albina Light & Water Co.*, 5 Am. R. R. & Corp. Rep. 464; *Illinois Central R. Co. v. People*, 7 Am. R. R. & Corp. Rep. 898.

*Reported in 33 Pac. Rep. 809.

APPLEBY V. ST. PAUL CITY RAILWAY CO.


(Supreme Court of Minnesota. July 14, 1898.)

1. STREET RAILROADS. EJECTING PASSENGER. DUTY OF COMPANY WHEN CAR TAKEN OFF AND PASSENGER TRANSFERRED TO "NEXT" CAR. The plaintiff, a passenger on defendant's street-car line, paid his fare, and received a transfer check which entitled him to continue his journey by the "next" connecting car on another line of the same company. He took the next car on the connecting line, and the conductor took up his transfer check. Without notice to the plaintiff, this car was taken off, after going a short distance. The conductor having disappeared, the plaintiff was informed by the driver of that car, that he should take the next passing car. He did so, but was put off by the conductor of that car because he had no transfer check, and refused to pay fare again. Held, that plaintiff showed *prima facie* a right to recover for the conduct of the defendant's agents, leading to and including the expulsion.

Cyrus J. Thompson and Thompson, Gates & Thompson, for appellant. *McCafferty & Noyes*, for respondent.

DICKINSON, J.—This action is for the recovery of damages for the forcible expulsion of the plaintiff from a street car of the defendant on its Selby avenue cable line. At the trial the court dismissed the action when the plaintiff rested his case. We shall only have to consider whether the evidence showed that the expulsion of the plaintiff from the car, in connection with the circumstances preceding it, was wrongful, so that the case should have gone to the jury.

Attention will be directed to what may conveniently be called two lines of street railway, connecting on Selby avenue at a cross street called Milton street. The westerly of these lines is operated by electric power; the easterly or cable line, by a cable. The tracks of the two lines are continuous, but the cars of each line stop at Milton street; the passengers changing cars at that point, which may be considered as the eastern end of the electric line, and the western end of the cable line. The cable line extends from Milton street east along Selby avenue and other streets to Broadway. The "power house," so called, where is the machinery by which the cable line is operated, is some seven or eight blocks east of Milton street. Here, also, cars are housed and repaired. Pas-



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its duty towards the plaintiff, to his injury. If it be said since the plaintiff could present no proper evidence of his right to ride, it was the duty of the conductor to put him off, it may be answered that the defendant, and not the plaintiff, may be deemed at fault for that condition of things. That is one of the grounds, upon which, in part, the defendant may be held responsible. Even though the conductor, in ejecting the plaintiff, may have done only what was apparently (to him) his duty, it does not follow that the defendant is not responsible therefor. It would be responsible if, by its previous neglect of duty towards the passenger, it had justified him in assuming to continue his journey on a car from which the conductor, in accordance with the regulations of the defendant, should have ejected him for non-payment of fare. *Pine v. Railway Co.* (Minn.) 10 N. W. Rep. 392; *Murdock v. Railroad Co.*, 137 Mass. 293; *Way Co. v. Fix*, 88 Ind. 381, and cases cited; *Railroad Co. v. Johnson* (Miss.) 9 South. Rep. 443; *Railroad Co. v. Rice*, 64 Md. 63, 10 Atl. Rep. 97; *Railroad Co. v. Griffin*, 68 Ill. 499. And under the circumstances the jury might have reasonably found that the defendant's conduct, through its agents, had justified the plaintiff in taking this car. The plaintiff, we repeat, was entitled to be carried on the cable line. He might presume that proper means, and a proper system or practice, had been provided for such service. The defendant had done all that was required of him, at least prior to the time when he left the car taken off at the power house to get on another. It is the duty of the carrier to give to its passengers such instructions or directions as to its own system or course of conduct as may be reasonably necessary to enable them to pursue their journey. *Dwinelle v. Railroad Co.*, 120 N. Y. 117; 24 E. Rep. 319. When it became apparent that the car was to be taken off without previous notice, the passengers had a right to expect information from some one as to how they were to proceed on the journey. The conductor seems to have then disappeared, and when they were informed by the car driver that they should take the next car they were justified in acting on that information. We do not decide whether they might not have done this with such direction. They are not presumed to have known that passengers from cars thus taken off were not allowed to resume

journey by the next passing car. It was the duty of the defendant to make some provision for them, and not only was this the course most naturally to be expected, but there seems to have been no other way provided and the only way in which the plaintiff could avail himself of his right to be carried was to take the passing car, as he did do. The case is distinguishable from those where one enters a carriage, knowing that he is without such evidence of his right of passage as the reasonable regulations of the carrier require. In brief, it might have been found by the jury that the plaintiff was prevented from the enjoyment of his right to be carried, and was subjected to expulsion from the car, not by reason of any fault on his part, but by the fault of the defendant; and in such a case there would be a right of recovery. We are aware that our decision is not in apparent harmony with all of the authorities. Perhaps the seeming conflict of authority has resulted either from differences in the cases presented or in the different views taken as to the real causes of action relied on. A distinction is to be observed between cases where courts, whether justified by the pleadings or not, have regarded the right of action as resting upon the bare fact of expulsion by a conductor or agent whose duty (to the carrier) required him to expel the passenger, and cases like this, where, as we consider, the cause of action is the conduct or neglect of the defendant which results in and also includes the expulsion. It follows that the court erred in dismissing the case. The plaintiff showed a right of action. We do not consider what the measure of his recovery may have been for that is not here involved. Order reversed.*

1. Street railroads. Transfer checks for passage must be used within the time limited.—Where a street railroad which is not obligated by its charter, or the ordinances of the city, to give transfer tickets from one line to another, and which does not hold out to the public that it will do so, gives a transfer conditioned upon its face for use within a certain time, the transfer must be used within that time or it will be void. *Heffron v. Detroit City R. Co.*, 92 Mich. 406; 53 N. W. Rep. 802.

2. Right of passenger to ride on fragment of coupon ticket mutilated by conductor on connecting line.—A ticket for a continuous ride over the whole length of a street railway and a connecting line was of a peculiar color and print, and was composed of two coupons, the upper of which was for use on the connecting line, and gave the names of its termini below, and the names of both lines above. Held, that a conductor of the connecting

*Reported in 55 N. W. Rep. 117.

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line was bound to accept for passage an upper fragment of the upper coupon which gave the names of the lines, on the assumption that the conductor of the other line^ccarelessly tore off the part giving the termini, in taking the lower coupon. *Rouser v. North Park St. R. Co.*, (Mich.), 56 N. W. Rep. 937.


3. When passage is continued on a second car, the conductor the latter is not bound to accept passenger's statement that he paid for through passage to another conductor—Defendant's statement, in which plaintiff was riding, did not go to the end of the line,—plaintiff's destination. The conductor informed him when the car stopped, that he could get off and take the next car. Plaintiff had paid his fare in the first car, but no transfer, or any evidence, except his own statement, that he was entitled to ride on the second car without paying. On his refusal to pay the fare demanded he was ejected, and brought an action for damages. Held, that plaintiff could not recover, even if he had a contract with defendant for a ride to the end of the line, because the conductor was not bound to accept his statement that he had such a contract, but it was plaintiff's duty to pay his fare, and seek redress for violation of the contract. *Mahoney v. Detroit City R. Co.*, Mich. 612; 58 N. W. Rep. 793.

QUEEN INSURANCE CO. ET AL. V. STATE EX REL. ATTORNEY GENERAL.

(Supreme Court of Texas. Dec. 14, 1893.)

1. TEXAS ANTI-TRUST ACT. WHETHER COMBINATION OF INSURANCE COMPANIES TO CONTROL RATES AND COMMISSIONS IS EMBRACED THEREIN. The act of Texas of March 30, 1889, defines a trust as a combination (1) to create or carry out restrictions in trade; (2) to control the production or price of merchandise or commodities; (3) to prevent competition in the making, selling or buying of merchandise, produce or commodities; (4) to fix at any standard figure, whereby its price to the public shall be controlled, any article or commodity of merchandise, produce or commerce intended for sale, use or consumption in the state; or, (5) to make or carry out any contract, etc., not to sell, or dispose of, or transport any article or commodity or article of trade, use, merchandise, commerce or consumption below a common standard, or to fix the price of any article, commodity or transportation, so as to preclude free competition in the sale or transportation of such article or commodity, etc. Held, not to include a combination of fire insurance companies and agents to fix and control rates of insurance and agents' commissions.

2. VALIDITY OF TEXAS ANTI-TRUST ACT. The said act after defining trusts provides forfeitures for corporations, and punishment for individuals, who violate its provisions, declares such violation a conspiracy against trade, and prescribes the necessary allegations of an indictment under the act, and the proof required. Held, that the statute is not a nullity for failure to expressly declare trusts unlawful, nor the acts constituting a trust punishable, nor an act a violation of its provisions, such declarations being clearly implied.



8. VALIDITY OF COMBINATION AMONG INSURANCE COMPANIES TO CONTROL RATES. POWER OF ATTORNEY-GENERAL TO ENJOIN. A combination of fire insurance companies to fix uniform rates of insurance and agents' commissions, throughout the state, though possibly unenforceable among its members as an unreasonable restraint of trade at common law, is not enjoined by the public, nor a ground for forfeiting its members' franchises, since the business is not one in which the public has an interest as in that of a common carrier or other corporation having the power of eminent domain, or of a dealer in a staple which is a prime necessary of life; not is it a professional service to which the public is entitled.

ACTION on relation of C. A. Culberson, attorney-general, against the Queen Insurance Company and others, to restrain a combination between them to fix rates and agent's commissions, and to restrain said companies from doing business in the state. From a judgment of the court of civil appeals (22 S. W. Rep. 1048) affirming the district court's judgment for plaintiff, defendants bring error.


Leake, Henry, Miller & Reeves, for plaintiff in error. *Chas. A. Culberson*, Atty. Gen., and *Frank Andrews*, Asst. Atty. Gen., for defendant in error.

GAINES, J.—This action was brought in the name of the state of Texas, by its attorney-general, against the Texas Insurance Club an association of insurance agents, and against fifty-seven foreign insurance corporations doing business in this state under permits granted in pursuance of the statutes of the state. It is alleged in the petition that the Texas Insurance Club was created with the consent and by the procurement of the other defendants, with the object of organizing a combination for the purpose of fixing a uniform rate of insurance throughout the state upon a graduated scale, and of thereby preventing competition among each other, and at the same time of establishing a fixed rate of commission to be paid to the agents of such companies. It is claimed in the petition that the acts charged against the defendants show an illegal combination, as defined and denounced in the act of March 30, 1889, entitled "An act to define trusts and to provide for penalties and punishment of corporations, persons, firms, and associations of persons connected with them, and to promote free competition in the state of Texas." Laws 1889, p. 141. It is also claimed in the petition that the combination, purposes and acts of the defendants

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are in restraint of trade and contrary to public policy, and fore illegal at common law. The prayer was that the Texas Insurance Club be dissolved, and that the permits of the other defendants be cancelled, or that the defendant be enjoined carrying out the objects of the combination as alleged in petition. The trial court held that the act of March 30, 1889, not apply to a combination to fix rates of insurance or the commissions of the agents of insurance companies and also that act was unconstitutional and void, by reason of the thirteenth section, which excepted from its operation "agricultural products and live stock while in the hands of the producer or raiser" and sustained a demurrer to so much of the petition as charged violation of that statute. However, the demurrer to that part of the petition which charged a combination alleged to be illegal at common law was overruled; and after hearing the evidence the court held that the effective allegations of the bill were sustained by the proof, and entered a decree enjoining the defendants from entering into or carrying out any agreements between them establishing rates of insurance, or fixing the percentage of commissions to be paid to their agents. The defendants appealed, and the attorney-general filed cross assignments of error. The court of civil appeals affirmed the judgment of the district court in every particular but that the statute of March 30, 1889, was invalid, because it now in terms declared that "trusts" such as are defined in the first section are illegal. Assuming that the whole case is before us on the pleadings and facts as determined by the court of civil appeals, we will proceed to dispose of the questions involved in the case as far as may be necessary for its disposition.

The act of March 30, 1889 reads as follows: "Act to define trusts and to provide for punishments and penalties of corporate persons, firms, and associations of persons connected with trusts, and to promote free competition in the state of Texas. Section 1. Be it enacted by the legislature of the state of Texas: That a trust is a combination of capital, skill or acts by two or more persons, firms, corporations, or associations of persons, or of either two or more of them for either, any, or all of the following purposes: First—To create or carry out restrictions in trade. Second—To limit or reduce the production or increase or reduce the price of merchandise or commodities. Third—To prevent competition




manufacture, making, transportation, produce or commodities. If figure, whereby its price to the public is controlled or established, any article of produce or commerce intended for sale in this state. Fifth—To make or enter into any contract, obligation or agreement which they shall bind or have the power to enforce, or to transport any article of produce, merchandise, commerce or standard, or by which they shall fix the price of such articles, commodities or graduated figure, or by which they shall or settle the price of any article between them or themselves as to restrict competition among the transportation of any such article, shall agree to pool, combine or conspire in connection with the sale or transportation of any commodity, that its price might be controlled.

* Sec. 4 Every foreign corporation doing business in this state, or any person or persons, or attorney-general to enforce this act, or proceedings in the district court of this state of Texas. * * * the provisions of this act shall constitute a conspiracy against trade, and any person engaged in any such conspiracy shall be liable in its commission, or who, or agent, servant, or employee shall carry out any of the stipulations thereunder, or in pursuance of this act, shall be punished by a fine of less than fifty nor more than one hundred dollars, or imprisonment in the penitentiary, not exceeding one year, or by either such fine or imprisonment. The provisions of this provision shall not apply. In any indictment for an offense under this act, it shall be sufficient to state the purposes or effect of the same.

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that the accused was a member of, acted with, or in pursuance of, it, without giving the name or description, or how, when or where it was created. Sec. 8. In prosecutions under this act it shall be sufficient to prove, that a trust or combination as defined herein exists, and that the defendant belonged to it, or acted for or in connection with it, without proving all belonging to it or proving producing any article of agreement or written instrument on which it may have been based, or that it was evidenced by any written instrument at all. The character of the trust alleged may be proved by its general reputation * * * Sec. 10. Each and every person, firm, corporation or association of persons who in any manner violate any of the provisions of this act, shall be liable on each and every day that such violation shall be committed or continued, to forfeit and pay the sum of fifty dollars, which may be recovered in the name of the state of Texas, in any county where the offense is committed, or where either of the offenders reside, or in Travis county, and it shall be the duty of the attorney-general or the district or county attorney to prosecute for and recover the same. Sec. 11. That any contract or agreement in violation of the provisions of this act, shall be absolutely void and not enforceable either in law or equity. Sec. 12. That the provisions hereof shall be held cumulative of each other and of all other laws in any way affecting them now in force in this state. Sec. 13. The provisions of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser. * * * "The omitted sections throw no light upon the questions under consideration.

Admitting, for the present, that the language of the statutes sufficiently manifests the intention of the legislature to make such combinations as are defined therein unlawful, and to make punishable acts committed in violation of its provisions, and that it is in conflict with the constitution by reason of the fact that it exempts "agricultural products and live stock, while in the hands of the producer or raiser" from its operation, we still have the question whether the combination charged in the petition is embraced within the provisions of the law. We are of opinion that this question must be answered in the negative. To determine that it is so embraced, we must hold either that it is a restriction in trade within the meaning of the first subdivision of section 1, and that



these words sufficiently define an offense so as to make it punishable under our laws, or that the contract of insurance is a commodity such as is named in the other subdivisions. A combination between two or more insurance companies to increase their rates or to diminish the rates to be paid to their agents is, in a general sense, a combination in restraint of trade. But we think that the words "restrictions in trade" were not intended to receive that construction in the statute under consideration. If so intended, it may be gravely doubted whether, under our laws, they sufficiently designate an offense so as to make it punishable. Our Penal Code contains the following general provisions: "Art. 8. In order that the system of penal law in force in this state may be complete within itself, and that no system of foreign laws written or unwritten may be appealed to, it is declared that no person shall be punished for any act or omission unless the same is made a penal offense, and a penalty is affixed thereto by the written law of this state." "6. Whenever it appears, that a provision of the penal law is so indefinitely framed, or of such doubtful construction that it cannot be understood, either from the language in which it is expressed or from some other written law of the state, such penal law shall be regarded as wholly inoperative." "Art. 9. This code and every other law upon the subject of crime which may be enacted, shall be construed according to the plain import of the language in which it is written, without regard to the distinction usually made between the construction of penal laws and laws upon other subjects; and no person shall be punished for an offense not made penal by the plain import of the words of the law." It must be conceded that except as to laws which result in a contract or which create a vested right, it is not in the power of one legislature to control the action of another. Any statute laying down a canon of construction may, as a general rule, be repealed, either expressly or impliedly, by a subsequent statute: and where, under a rule of construction declared in a former law, a statute cannot take effect, which would be operative but for the former act, the argument is certainly cogent that it was the intention of the legislature in the last enactment to repeal the rule of construction laid down in the former. But it may be argued with equal force that a provision of the Penal Code affixing a punishment to an act named or otherwise designated, but not accurately and expressly defined, should be

enforced, notwithstanding the rules of construction laid down in its general provisions. It may be plausibly maintained that the intention was that all the provisions should stand together, and that the special provision should be deemed an exception, and that the general rule should yield to it. Yet, under article 3 of the Penal Code as it existed before the Revised Statutes took effect, which "declared that no person should be punished for any act or omission as a penal offense, unless the same is expressly defined," it was held that a special provision of that Code, which sought to make punishable an act without defining it was inoperative. *Johnson v. State*, 4 Tex. App. 63; *Wolff v. State*, 6 Tex. App. 195; *Rogers v. State*, 8 Tex. App. 401; see also *State v. Foster*, 31 Tex. App. 578. That provision was repealed by the Revised Statutes, which adopted in its stead the amended article 3, herein before quoted. But in *French v. State*, 14 Tex. App. 76, article 398, as amended by the act of March 27, 1879 (Laws 1879, p. 67), was held inoperative by reason of the rule of construction laid down in article 6, *supra*. In like manner, in *Ex parte Gregory*, 20 Tex. App. 210, the rule of construction announced in article 9 was recognized as applicable to a municipal ordinance. That article was primarily intended to abrogate the rule of the common law that penal statutes should be construed strictly; but it expressly declares another rule, which is in accord with the common law, and which is founded upon the soundest reason. There is a maxim that ignorance of the law excuses no one, which is not true as applied to every case, for a man is not guilty of theft who honestly takes property under an honest claim of right, though he be mistaken as to the law. But it is true in the sense that no one can allege his ignorance of the law which makes a certain act penal, in justification of his commission of that act. If he be held bound to know the law, he should have the means of knowing it, and hence he should not be punishable for the infringement of a statute unless it designate with a fair degree of clearness and precision the act or omission which is forbidden by it. The offense need not be "defined," in the logical legal sense of that word, for general terms may be used, which in themselves require to be defined; but the terms employed should be sufficiently definite in their meaning as plainly to designate the very act which is sought to be made punishable by law.

Applying these rules of construction, we are of opinion that the acts charged against the defendants do not subject them to the forfeitures and penalties therein provided for, under that part of the statute which seeks to make unlawful combinations "to create or carry out restrictions in trade." These words are very comprehensive in any aspect, and, if their meaning is limited, it becomes difficult to define the sense in which they were employed by the legislature. In ordinary language the word "trade" is employed in three different senses: First, in that of the business of buying and selling; second, in that of an occupation, generally; and, third, in that of a mechanical employment, in contradistinction to agriculture and the liberal arts. Ordinarily, when we speak of "trade," we mean commerce, or something of that nature; when we speak of "a trade," we mean an occupation, in the more general or the limited sense. In law, the words "restraint of trade" are fairly well defined; and the question presents itself whether, in the use of the words "restrictions in trade" the legislature meant to use the word "trade" in the last sense, or as the mere equivalent of "commerce" or "traffic." Some contracts in restraint of trade are held to be contrary to public policy, and unlawful in the sense that they will not be enforced by the courts. Others are lawful and enforceable. To be unlawful they must be unreasonable. As to restraints which are reasonable the authorities are not in accord, though the evident tendency of modern decisions is to uphold such contracts in doubtful cases. The rule as to contracts in unreasonable restraint of trade has been applied without question to very varied employments,—to professional men, such as attorneys at law and physicians, as well as to merchants, shop keepers, carriers, and those engaged in mechanical pursuits of every character. The rule is founded both upon the ground that the public has an interest in the employment, and upon the further ground that it is contrary to public policy that any person should wholly deprive himself of his right to pursue an occupation in which he is presumably skilled. See *Mitchell v. Reynolds*, 1 Smith, Lead. Cas. (8th Amer. Ed.) 417, and English and American notes. But while a party may bind himself for an adequate consideration not to pursue his avocation within the limits of a prescribed locality, provided the limits be reasonable, he cannot bind himself not to follow his trade in any place whatever. Now, an agreement between two or more

persons, by which one of them undertakes to bind himself not to follow his trade or practice his profession in a territory of prescribed limits, is a "combination," within the meaning of the statute under consideration. A contract between two or more to do a thing is a "combination of * * * acts" of such persons to bring about the performance of the contract. It is upon this theory, in part, that the charge made in the petition is based. Now, the clause of the act which we are endeavoring to construe makes no distinction between such restraints of trade as are reasonable and such as are unreasonable. Hence, if we should give to the words, "restrictions in trade" their ordinary technical meaning, it would follow that the act made punishable all contracts in restraint of trade however reasonable they may be. It would follow that if one merchant engaged in the hardware business should buy out another, such other agreeing not to pursue the same business on the same block or street, or in the same town, for a limited time, both would be subject to the penalties affixed by the act. It is probable that the legislature has the power to make such a law; but it is unreasonable to presume that they intended to make it, and no construction ought to be given to an act which would lead to such results, unless its language is so clear and unambiguous as to admit of no other conclusion. It is true that article 9 of the Penal Code, already quoted, requires us to construe the act "according to the plain import of the language in which it is written, without regard to the distinction usually made between the construction of penal laws and laws upon other subjects;" but when the words employed have different meanings, one being more limited than another, it does not require that we should construe them in the more comprehensive sense. The principle is inherent in the construction of all laws of doubtful import, that the intention of the legislature must be sought for and when discovered, must govern. In discovering that intention it is proper to look to the consequences of any particular interpretation and, if they be found unreasonable or oppressive, such interpretation, ought to be rejected. The penalty affixed by the act in question for a violation of its provisions is a fine of not less than \$50, nor more than \$5,000, and imprisonment in the penitentiary not less than one, nor more than ten, years, or by either such fine or imprisonment. Each day of the continuance of the combination is made a separate offense.

The offense may be punished by confinement in the penitentiary, and is therefore a felony. We do not think that it was the purpose of the legislature to give to the word "trade" so comprehensive a meaning as would subject all parties to "contracts in restraint of trade" (as these terms are understood at common law) to such heavy penalties; and conclude that the word must be construed in a more restricted sense, and as synonymous with "traffic." In this sense it embraces the buying and selling of any article of commerce, the barter of such articles, and their transportation by common carriers; but it does not embrace the business of insurance, which is trade only in the sense that it is an occupation or employment. If, therefore, the acts charged in the petition are punishable under the statute, they must be denounced by some other provision. Is the contract of insurance an "article of commerce" or a "commodity," within the meaning of those terms as used in the remaining four subdivisions of the statute? In *Paul v. Virginia*, 8 Wall. 168, the supreme court of the United States held that the business of insurance, as carried on in one state by a company chartered by another, was not commerce between the states; and the same doctrine is affirmed by the supreme court of Kansas (*State v. Phipps*, 31 Pac. 1097). We have no reason to doubt the correctness of the conclusion. It is only by a strained construction that the word "commerce" can be made to embrace the business of insurance, and to say that insurance is an article of commerce is a construction still more strained. It is an aid to commerce, but not commerce itself; nor is it an article of commerce. In *Nathan v. Louisiana*, 8 How. 73, the court say that a dealer in foreign exchange "is not engaged in commerce, but in supplying an instrument of commerce. He is less engaged in it than the ship builder, without whose labor foreign commerce could not go on." The word "commodity" has two significations. In its most comprehensive sense it means "convenience, accommodation, profit, benefit, advantage, interest, commodiousness;" but, according to Webster's International Dictionary, the use of the word in this sense is obsolete. Page 286. The word is ordinarily used in the commercial sense of any movable or tangible thing that is ordinarily produced or used as the subject of barter or sale; and we think that this was the meaning intended to be given to it by the legislature in the statute in question. This clearly appears by the

context. The language descriptive of the second category of offenses—"to limit or reduce the production or increase or reduce the price of merchandise or commodities"—implies that a commodity is something that may be produced; so, by that description, of the third class, a commodity is something that may be manufactured, made, transported, and sold; in the fourth, it implies something that may be sold, used, or consumed; and so, also, the fifth and last class, it relates to a commodity that is the subject of sale and transportation. Insurance is neither "produced" "consumed," "manufactured," "transported," nor "sold," in the ordinary signification of any of these words, and therefore it is not within "the plain import" of the language employed in the act.

But there is another point of view from which the statute in question should be considered. Its title is, "An act to define trusts, and to provide for penalties and punishment of corporations, persons, firms, and associations of persons connected with them, and to promote free competition in the state of Texas." The term "trusts" is not here employed in a technical legal sense. By very recent commercial usage, the meaning of the word has been extended so as to comprehend combinations of corporations or capitalists for the purpose of controlling the price of articles of prime necessity, or the charges of transportation for the public. The formation of gigantic combinations for these purposes in late years has created alarm and excited the liveliest interest in the public mind. The amount of discussion which it has invoked, considering the time during which it has progressed, is probably without parallel. See 2 Beach, *Priv. Corp.* 856, and notes. In the year 1888 the discussion seems to have become general, and in 1889 many legislatures, including our own, made laws for the purpose of punishing and repressing such conspiracies. *Id.* 1351, and note 2. Notable instances of these combinations were those of the manufacturing corporations engaged in refining sugar, which were declared illegal by the court of appeals of New York in the case of the *People v. North River Sugar Refining Co.*, 121 N. Y. 582; 24 N. E. Rep. 834; "*The Cotton Seed Oil Trust*," (*State v. American Cotton Oil Trust*, 40 La. Ann. 8; 3 South. 409); "*The Diamond Match Trust*," (*Richardson v. Buhl*, [Mich.] 43 N. W. 1102); "*The Chicago Gas Trust*," (*People v. Chicago Gas Trust Co.*, 130 Ill. 268; 22 N. E. 798); "*The Standard Oil Trust*," (*Rice v. Rockefeller*, [Sup.] 9 N. Y.

Supp. 866); "The Cattle Trust," (Gould v. Head, 38 Fed. 886); and "The Alcohol Trust," (State v. Nebraska Distilling Co., [Neb.] 46 N. W. 155). For other cases of like character, see *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173; *Arnot v. Coal Co.*, 68 N. Y. 558; *Lumber Co. v. Hayes*, 76 Cal. 387; 18 Pac. Rep. 391; *Clancey v. Manufacturing Co.*, 62 Barb. 395; *Craft v. McConoughy*, 79 Ill. 346; *Bagging Ass'n v. Kock*, 14 La. Ann. 168; *Gibbs v. Gas Co.*, 130 U. S. 396; 9 Sup.Ct. 553; *Oil Co. v. Adoue*, 83. Tex. 650; 19 S. W. 274; and *Anderson v. Jett*, 89 Ky. 375; 12 S. W. 670. The instances of combinations shown by the cases cited serve to illustrate the causes of popular discontent, and the evils which the legislatures of several states sought to remedy by direct statutory enactments upon the subject. They were combinations organized for the purpose of affecting the prices of articles of prime importance in commerce, or the rates of transportation and intercommunication. The evils resulting from these practices were doubtless paramount in the minds of our legislators when they passed the statute under consideration, and it was to repress these practices that the law was enacted. By "the plain import of its language" it makes unlawful all combinations to raise or depress the price of all articles of commerce whatever, or to increase or diminish the rates of transportation of such articles. It seems to us, therefore, that the words in the first subdivision of section 1 of the act—"to create or carry out restrictions in trade"—were intended only as a general expression of the law, and that the acts defined in the subsequent members of the section were intended as a specific definition of what was meant in the first. *National Benefit Co. v. Union Hospital Co.* (Minn.) 47 N. W. 806, was a case involving the question of a partial restraint of trade, and in their opinion the court say: "There are two classes of cases, some of which appellants have cited, which are often confounded with, but are clearly distinguishable from, cases like the present, and stand

indictment under the act, "to state the purposes and effect of the trust or combination and that the accused was a member of and acted with or in pursuance of it, without giving its name or description, or how, when or where it was created." The eighth section also provides that it shall be sufficient to prove upon the trial that the "the trust or combination as defined herein exists and that the defendant belonged to it or acted for or in connection with it, without proving all the members belonging to it," etc. There is no express declaration that trusts are unlawful,—the acts which are declared to constitute a trust are not expressly made punishable, nor is any act expressly declared to be a violation of the provisions of the statute; yet the language is sufficient, we think, to manifest unmistakably the intention of the legislature to punish as offences some of the acts defined in the first section, and it is but reasonable to conclude that the purpose was to subject them all to a like punishment. The intention of the legislature is the aim of statutory construction, and where, though not expressed, it is clearly manifested by implication from the language used, we cannot say that it should not have effect. That which is not expressed in words may be "plainly imported" by implication. We have deemed it proper to say this much upon this question, although its determination, in our opinion, is not necessary to a decision of this case. The other question, as to the validity of the statute, involves a construction of the constitution, and we do not feel called upon to determine it. The decision of a grave constitutional question, although involved in a case, is properly pretermitted until a controversy arises in which such decision becomes necessary to its disposition.

Having determined that the acts charged against the defendants are not embraced within the provisions of the statute, it becomes necessary to decide whether or not they are unlawful at common law. We have found no direct decision in any court of last resort upon the point. The decisions upon cases involving similar questions are not altogether harmonious. We have seen that contracts in unreasonable "restraint of trade" are illegal in the sense that they are not enforceable. Of these, there is a well defined class,—those in which the parties seek to bind themselves by an agreement that one of them shall cease to pursue his vocation. The terms are usually employed by the courts in this sense. It is clear

that the combination in question is not of this class. But, employing the terms in a looser sense, it is frequently said that agreements to raise or depress prices between persons engaged in the same business is a combination in restraint of trade. That such contracts, as applied to certain kinds of business, are unlawful, in the sense that they are not valid, there is no doubt; but whether the rule extends to every class of business is a different question. It extends to a business in which the public have a right, as distinguished from a business which may be merely beneficial to the public. Such is the carrying trade, and especially the business of transportation by railroad and communication by telegraph. Railroad and telegraph companies derive their right to condemn property from the fact that their business is established for a public use. So, the business of gas companies, who have acquired a right to lay their pipes in the public streets, in analogy to that of railroad companies, is treated as public. *People v. Chicago Gas Trust Co* (Ill. Sup.), 22 N. E. 798. Thus far we may clearly see our way; but when we come to a business not public in its character, in the sense previously indicated difficulties arise. We take it as being well settled that all the combinations among dealers in provisions or other articles of prime necessity are deemed in law contrary to public policy, and contracts to effect or carry out such combinations are held void. *Bagging Ass'n v. Kock*, 8 La. Ann. 168; *Lumber Co. v. Hayes*, 76 Cal. 387; 18 Pac. 391; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173. Combinations of this character are commonly called "monopolies," but they are not the technical monopolies known to the common law. 4 Bl. Comm. 12, § 9. The doctrine that they are illegal probably had its origin in the laws against forestalling, regrating, and engrossing,—offenses which, at a very early day in England, were made punishable by statutes which have since been repealed. They were probably offenses at common law, though their precise nature, as defined in that system, seems to be obscure. 1 Bish. Crim. Law (8th Ed.), § 525. According to Blackstone, "forestalling" was defined by the statute "to be the buying or contracting for any merchandise or victual coming in the way to market; or dissuading persons from bringing their goods or provisions there, or persuading them to enhance the price when there; or of any practices to make the

market dearer to the fair trader;" and "regrating" "to be the buying of corn or other dead victual in any market and selling it again in the same market or within four miles of the place." "Engrossing" "is the buying up large quantities of corn or other dead victual with intent to sell them again." As we have said, these statutes have been repealed in England. They were applicable to a condition of society which no longer exists. But it is to be presumed that the common-law principle which underlies them is the origin of the modern doctrine on the subject. We find that most of the cases in which agreements among manufacturers and dealers to increase the price of their wares and commodities related to some merchantable article of necessity or of great utility. In the case of *Bagging Ass'n v. Kock*, *supra*, it is said in the opinion that bagging is an article "of prime necessity" to cotton planters. In the elaborate opinion delivered in the trial court in the *Sugar Refining Case*, Judge Barrett lays stress upon the fact that sugar is "a necessary article of commerce." *People v. North River Sugar Refining Co.* (Cir. Ct.) 3 N. Y. Supp. 401. So, also, in the opinion in the same case in the supreme court. 7 N. Y. Supp. 406. In the opinion in the same case in the court of appeals the question was not discussed, it not being deemed necessary to a decision of the case. 121 N. Y. 582; 24 N. E. 834. In *Richardson v. Buhl* (Mich.), 43 N. W. 1102, the court also say: "The article" in controversy "has come to be regarded as one of necessity, not only in every household in the land, but one of daily use by almost every individual in the country." Similar expressions may be found in other cases. On the other hand, in *Roller Co. v. Cushman*, 143 Mass. 353, 9 N. E. 629, an agreement between three manufacturers of shade rollers to control the manufacture and sale of their products was held not unlawful, distinctly upon the ground that their wares were not articles of "prime necessity." The doctrine was adhered to and reaffirmed by the same court in the subsequent case of *Gloucester Isinglass & Glue Co. v. Russia Cement Co.* 154 Mass. 92; 27 N. E. 1005. In the latter case the court say: "Their contract had no relation to an article of prime necessity or to staple commodities ordinarily bought and sold in market." In most of the cases in which agreements between persons doing a business not of a public character have been held contrary to public policy and

anything else of a like helpful nature, severally enabling the members to obtain higher wages, nothing could be more commendable, and nothing further from the inhibition of the law; or, if employers should combine simply to reduce wages, not proposing any unlawful means, perhaps we might not so much commend them, yet still they would stand under no disfavor from the law,—the result of which is that a conspiracy to enhance or reduce wages is not indictable *per se*, while yet it may be so by reason of proposed unlawful means." 2 Bish. Crim. Law, § 233, subd. 2. The author then proceeds to consider certain means which have been determined to be unlawful, in which a mere agreement by men not already under contract not to work unless for a certain rate of wages does not seem to be included. But the matter seems to be involved in some obscurity. In a previous section the author cites the remarks of distinguished English judges, including Lord Mansfield, to the effect that such agreements are unlawful in themselves but adds: "In a later case, Earle, J., perhaps with a view to conforming to the statute of 6 Geo. IV., c. 129, § 4, yet distinctly qualifying the words of Lord Mansfield, stated it as settled that workmen are at liberty, while they are perfectly free from engagements, and have the option of entering into employment or not to agree among themselves to say, 'We will not go into any employ unless we can get a certain rate of wages.'" Mr. Freeman, in his note to the case of *People v. Fisher*, says: "Recent decisions in England, and the spirit now prevailing there and in this country, of giving encouragement to workmen in their endeavors to associate themselves into organizations for their mutual benefit, have settled beyond question that unemployed workmen may unite, and agree not to work unless for a certain price. This is a plain right, upon which no doubt ought ever to have existed" 28 Amer. Dec. 508. The learned annotator then quotes: "The law is clear that workmen have a right to combine for their own protection, and to obtain such wages as they may choose to agree to demand;" citing *Reg. v. Rowlands*, 5 Cox Crim. Cas. 436, 460. In *Com. v. Hunt*, 4 Metc. (Mass.) 111, it was held by the supreme court of Massachusetts that an association among journeymen bootmakers in which they bound themselves not to work for any person who employed one not a member of the association, was not indictable at common law. Following that decision, that court also held, in *Bowen*

v. Matheson, 14 Allen, 499, that an agreement among certain defendants by which they sought to compel the plaintiff a shipping master, among other things, to ship men from them at an established rate of wages, was not illegal, and did not give a ground of action, although the plaintiff's business had been damaged by the conspiracy. So, also, in *Carew v. Rutherford*, 106 Mass. 10, they say that "it is no crime for any number of workmen to associate themselves, and agree not to work or deal with certain men or certain classes of men, or work under certain wages or without certain conditions." We take it, therefore, that the weight of authority is against the proposition that such a combination among workmen was indictable at common law. It does not follow, however, that any agreement of that character is not against public policy, and therefore void; but it is proper to show that it was not an indictable offense at common law, for, if so, any contract in pursuance of such an agreement would have been illegal, in the sense that it would not be enforceable in the courts.

Upon the question whether an agreement among workmen to raise their wages is contrary to public policy, as being in restraint of trade, there is some conflict in the authorities. In *Collins v. Locke*, 4 App. Cas. 674, the judicial committee of the privy council held that a contract between stevedores in a certain port, by which they agreed to parcel out the stevedoring business, was not void, as a contract in restraint of trade, at common law. The court say: "The objects which this agreement has in view are to parcel out the stevedoring business of the port among the parties to it, and to prevent competition at least among themselves, and also, it may be, to keep up the price to be paid for the work. Their lordships are not prepared to say that an agreement having these objects is invalid if carried into effect by proper means, — that is, by provisions reasonably necessary for the purpose, — though the effect of them might be to create a partial restraint upon the power of the parties to exercise their trade." In *Association v. Walsh*, 2 Daly, 1, which was a civil action, it was held that it was not unlawful for workmen to agree that they would not work below certain rates, and that a by law of an association which provided a pecuniary penalty for the violation by way of a fine could be recovered. The decision was not by a court of last resort, but the opinion is able, learned, and exhaustive, and, as it seems to us, convincing.

See, also, *Sayre v. Association*, 1 Duv. 148. In *Ladd v. Manufacturing Co.* 53 Tex. 172, it was also decided, in effect, that a combination among the compressing companies in the city of Galveston, by which they increased the compressing prices for cotton, was not unlawful.

This proposition is based distinctly upon the ground that compressing cotton is not a public business. On the other hand, it is held by the supreme court of Illinois, in *Moore v. Bennett*, 29 N. E. 888, that an association of stenographers, one of the objects of which was to control prices to be charged for work by its members, is an illegal combination, and that its rules would not be enforced so as to sustain an action of one member against another. The cases cited all relate to combinations between carriers or dealers in, or producers of, staple articles of commerce, as the opinion itself shows. The court also quote from *Tiedeman on Commercial Paper* (section 190), as follows: "All combinations of capitalists or of working men for the purpose of influencing trade in their especial favor by raising or reducing prices are so far illegal that agreements to combine cannot be enforced." The cases cited by this author do not sustain the proposition. *Morris Run Coal Co. v. Braclay Coal Co.* 68 Pa. St. 178, was a combination to affect the price of coal. *Stanton v. Allen*, 5 Denio, 434, was an association composed of the proprietors of canal boats to regulate the rate of transportation. In the other cases cited—*Brisbane v. Adams*, 3 N. Y. 129; *Noyes v. Day*, 14 Vt. 384; *Doolin v. Ward*, 6 Johns. 194; and *Thompson v. Davies*, 13 Johns. 112—it is simply held that agreements to prevent competition in bidding at auction sales are contrary to public policy, and therefore void. Combinations of that character tend to affect the price of the thing to be sold, and directly to defraud the owner. In his work on sales, the same author lays down the same proposition, and attempts to sustain it by the same authorities. *Tied. Sales*, § 303. Notwithstanding our great respect for the court which made the decision, we cannot concur in the doctrine announced in the case of *Moore v. Bennett*. It is opposed to the well considered cases on the same point which we have previously cited, and which, as we think, lay down the correct rule. Now, the business of stevedores is essential to maritime commerce, and that of compressing cotton is an important aid to traffic in that staple. In that particular, neither are secondary to

cind it at the suit of a party claiming against it. The public policy which creates the rule in these cases, it seems to us, has gone no further in providing a sanction for its enforcement than to refuse a remedy in the courts to either party to the agreement. The North River Sugar Refining Case was tried, and appealed to the supreme court *in banc*, and thence an appeal was again taken to the court of appeals. It was stubbornly contested and argued with distinguished ability on both sides at every stage of its progress. In the opinion of the trial judge, stress is laid upon the fact that the tendency of the combination was to create a monopoly in restraint of trade. 3 N. Y. Supp. 401. In the supreme court this is made a principle ground upon which the opinion of the court is based. The opinion recognizes that it was a conspiracy in restraint of trade under the statute of New York, and an indictable offense. 7 N. Y. Supp. 406. But it is notable that the court of appeals expressly waive any consideration of that question, and hold that the defendant corporation had subjected its charter to forfeiture, by reason of its having exceeded its powers in forming with other corporations a trust in the nature of a partnership. It may be that to restrain a party from performing a contract merely void at common law, as being contrary to public policy, would be to violate the rule which leaves all the parties to suffer the consequence of their improvident engagements of such a character, and gives relief to none; but this would not apply if the interest of a third person was to be affected. The question is not without difficulty, and, since its determination is not necessary to this case, we do not decide it. It may be that a thorough examination of the authorities would show that it is settled.

We would not be understood as holding that the combination declared in this case is not detrimental to the public, and that sound policy does not demand the suppression of that and all like organizations of a similar magnitude. There are certain contracts, and perhaps combinations, which the law regards as being against public policy. The courts cannot extend the rule merely by reason of their opinion as to what the law ought to be. What other combinations or contracts should be held illegal on the ground of public policy is a political question,—that is to say, one which it is the province of the legislative department of the government to determine. The legislature has power to weigh the public

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fest from the incorporation of the insurance provision in the body of the act. * * * How can it be said that the business of insurance is foreign to the title of the act, when the subject expressed in the title—taken in its broad sense, and the one intended by the legislature—would embrace such business?

In the subsequent case of *State v. Phipps*, 50 Kan. 609; 31 Pac. Rep. 100, this decision was approved and followed. It was also held in the same case that the business of insurance, as ordinarily conducted in that state by insurance companies organized under the legislation of other states, is not interstate commerce, and that foreign insurance companies doing business in that state that combine to control and increase the rates of insurance on property in a city in that state, violate the provision of chapter 257, Laws of 1889, "An act to declare unlawful trusts and combinations in restraint of trade of products, and to provide penalties therefor," and their local agents who act in aid of, and do, enforce such combined rates, are subject to prosecution under the provisions of said act.

3. Trusts and trade combinations.—Upon this subject generally, see the succeeding four cases and the notes thereto.

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(Supreme Court of Minnesota. July 20, 1898.)

1. TRADE COMBINATIONS. ASSOCIATION OF RETAIL LUMBER DEALERS TO PREVENT PURCHASES OF WHOLESALERS WHO SELL DIRECT TO CONSUMERS. INJUNCTION. Any man (unless under contract obligation, or unless his employment charges him with some public duty) has a right to work for or deal with any man or class of men, as he sees fit; and no right, which one man may exercise singly, any number may agree to exercise jointly.

2. A large number of retail lumber dealers formed a voluntary association by which they mutually agreed that they would not deal with any manufacturer or wholesale dealer who should sell lumber directly to consumers. At any point where a member of the association was carrying on a retail yard, and provided in their by-laws that, whenever any wholesale dealer or manufacturer made any such sale, their secretary should notify all the members of the fact. The plaintiff having made such a sale, the secretary threatened to send notice of the fact, as provided in the by-laws, to all the members of the association. Held, not actionable, and no ground for an injunction.

ACTION by the Bohn Manufacturing Company against W. Hollis and others for an injunction. From an order denying a motion to dissolve the temporary writ issued, defendants appeal.

Wm. A. Lancaster, for appellant. *Warner, Richardson & Lawrence*, for respondent.

MITCHELL, J. The pleadings in this case, and the affidavits read on the motion to dissolve the temporary injunction, are

voluminous, and so abound in mere inferences as to motives and consequences, and in adjectives and other qualifying epithets, as to convey the impression at first sight, that the facts were both complicated and controverted. But a careful analysis of the record proves that there is no real dispute as to the material facts, which are comparatively simple. Stripped of all extraneous matter, the case discloses just this state of facts: The plaintiff is a manufacturer and vendor of lumber and other building material, having a large and profitable trade at wholesale and retail in this and adjoining states, a large and valuable part of this trade being with the retail lumber dealers. The defendant the Northwestern Lumbermen's Association is a voluntary association of retail lumber dealers, comprising from twenty-five to fifty per cent. of the retail dealers doing business in the states referred to, many of whom are, or have been, customers of the plaintiff. A "retailer," as defined in the constitution of the association, is "any person who is engaged in retailing lumber, who carries at all times a stock of lumber adequate to the wants of the community, and who regularly maintains an office as a lumber dealer, and keeps the same open at proper times." Any wholesale dealer or manufacturer of lumber who conforms to the rules of the association may become an honorary member, and attend its meetings, but is not allowed to vote. The object of the association is stated in its constitution to be "the protection of its members against sales by wholesale dealers and manufacturers to contractors and consumers." The object is more fully stated, and the means by which it is to be carried into effect are fully set out, in sections 3, 3½, 4, and 6 of the by-laws, which are all that we consider material in this case. The plaintiff sold two bills of lumber directly to consumers or contractors at points where members of the association were engaged in business as retail dealers. Defendant Hollis, the secretary of the association, having been informed of this fact, notified plaintiff, in pursuance of section 3 of the by-laws, that he had a claim against it for ten per cent of the amount of these sales. Considerable correspondence with reference to the matter ensued, in which the plaintiff, from time to time, promised to adjust the matter, but procrastinated and evaded doing so for so long that finally Hollis threatened that unless plaintiff immediately settled the matter he would send to all the members of the association the lists or notices

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provided for by section 6 of the by-laws, notifying them that plaintiff refused to comply with the rules of the association, and no longer in sympathy with it. Thereupon plaintiff commenced this action for a permanent injunction, and obtained, *ex parte* temporary one, enjoining the defendants from issuing these notices etc. This appeal is from an order refusing to dissolve the temporary injunction. It is alleged, and in view of the facts to be presumed to be true, that if these notices should be issued members of the association would thereafter refuse to deal with the plaintiff, thereby resulting in loss to it of gains and profits.

The case presents one phase of a subject which is likely to be one of the most important and difficult which will confront courts during the next quarter of a century. This is the age of associations and unions, in all departments of labor and business purposes of mutual benefit and protection. Confined to proper limits, both as to end and means, they are not only lawful, but laudable. Carried beyond those limits, they are liable to become dangerous agencies for wrong and oppression. Beyond what limits these associations or combinations cannot go, without interference with the legal rights of others, is the problem which, in various phases, the courts will doubtless be frequently called to pass upon. There is, perhaps, danger that, influenced by such terms of elusive meaning as "monopolies," "trusts," "boycotts," "strikes" and the like, they may be led to transcend the limits of their jurisdiction, and, like the court of king's bench in *Bagg's Case*, 98a, assume that, on general principles, they have authority to correct or reform everything which they may deem wrong, or Lord Elsemere puts it, "to manage the state." But whatever doubts or difficulties may arise in other cases, presenting other phases of the general subject involved here, it seems to us that there can be none on the facts of the present case. Both the affidavits and the brief in behalf of the plaintiff indulge in a great deal of strong and even exaggerated assertion, and in many words and expressions of very indefinite and elusive meaning, such as "wreck," "coerce," "extort," "conspiracy," "monopoly," "drive out of business," and the like. This looks very formidable, but in law, as well as in mathematics, it simplifies things very much to reduce them to their lowest terms. It is conceded that retail lumber yards in the various cities, towns, and villages, are not only a pub

convenience, but a public necessity ; also, that, to enable the owners to maintain these yards, they must sell their lumber at a reasonable profit. It also goes without saying that to have manufacturers or wholesale dealers sell at retail, directly to consumers, in the territory upon which the retail dealer depends for his customers, injuriously affects and demoralizes his trade. This is so well recognized as a rule of trade in every department, that generally wholesale dealers refrain from selling at retail within the territory from which their customers obtain their trade. Now, when reduced to its ultimate analysis, all that the retail lumber dealers, in this case, have done, is to form an association to protect themselves from sales by wholesale dealers or manufacturers, directly to consumers or other non-dealers, at points where a member of the association is engaged in the retail business. The means adopted to effect this object are simply these : They agree among themselves that they will not deal with any wholesale dealer or manufacturer who sells directly to customers, not dealers, at a point where a member of the association is doing business, and provide for notice being given to all their members whenever a wholesale dealer or manufacturer makes any such sale. That is the head and front of defendants' offense. It will be observed that defendants were not proposing to send notices to any one but members of the association. There was no element of fraud, coercion or intimidation, either towards plaintiff or the members of the association. True, the secretary, in accordance with section 3 of the by-laws, made a demand on plaintiff for ten per cent. on the amount of the two sales. But this involved no element of coercion or intimidation, in the legal sense of the terms. It was entirely optional with the plaintiff whether it would pay or not. If it valued the trade of the members of the association higher than that of non-dealers at the same points, it would probably conclude to pay ; otherwise, not. It cannot be claimed that the act of making this demand was actionable ; much less, that it constituted any ground for an injunction ; and hence this matter may be laid entirely out of view. Nor was any coercion proposed to be brought to bear on the members of the association, to prevent them from trading with the plaintiff. After they received the notices, they would be at entire liberty to trade with plaintiff, or not, as they saw fit. By the provisions of the by-laws, if they traded with the plaintiff, they

were liable to be "expelled;" but this simply meant to cease to be members. It was wholly a matter of their own free choice which they preferred,—to trade with the plaintiff, or to continue members of the association. So much for the facts, and all that remains is to apply to them a few well-settled, elementary principles of law:

1. The mere fact that the proposed acts of the defendant would have resulted in plaintiff's loss of gains and profits does not, of itself, render those acts unlawful or actionable. That depends on whether the acts are, in and of themselves, unlawful. "Injury," in its legal sense means damage resulting from an unlawful act. Associations may be entered into, the object of which is to adopt measures that may tend to diminish the gains and profits of another, and yet, so far from being unlawful, they may be highly meritorious. *Com. v. Hunt*, 4 Metc. (Mass.) 111; *Steamship Co. v. McGregor*, 21 Q. B. Div. 544.

2. If an act be lawful,—one that the party has a legal right to do,—the fact that he may be actuated by an improper motive does not render it unlawful. As said in one case, "the exercise by one man of a legal right cannot be a legal wrong to another," or, as expressed in another case, "malicious motives make a bad case worse, but they cannot make that wrong which, in its own essence, is lawful." *Heywood v. Tillson*, 75 Me. 225; *Phelps v. Nowlen*, 72 N. Y. 39; *Jenkins v. Fowler*, 24 Pa. St. 308.

3. To enable the plaintiff to maintain this action, it must appear that defendants have committed, or are about to commit, some unlawful act, which will interfere with, and injuriously affect, some of its legal rights. We advert to this for the reason that counsel for the plaintiff devotes much space to assailing this association as one whose object is unlawful because in restraint of trade. We fail to see wherein it is subject to this charge; but even if it were, this would not, of itself, give plaintiff a cause of action. No case can be found in which it was ever held that, at common law, a contract or agreement in general restraint of trade was actionable at the instance of third parties, or could constitute the foundation for such an action. The courts sometimes call such contracts "unlawful" or "illegal," but in every instance it will be found that these terms were used in the sense, merely, of "void" or "unenforceable" as between the parties; the law considering the dis-

advantage so imposed upon the contract a sufficient protection to the public. *Steamship Co. v. McGregor*, 23 Q. B. Div. 598, [1892] App. Cas. 25.

4. What one man may lawfully do singly, two or more may lawfully agree to do jointly. The number who unite to do the act cannot change its character from lawful to unlawful. The gist of a private action for the wrongful act of many is not the combination or conspiracy, but the damage done or threatened to the plaintiff by the acts of the defendants. If the act be unlawful, the combination of many to commit it may aggravate the injury, but cannot change the character of the act. In a few cases there may be some loose remarks apparently to the contrary, but they evidently have their origin in a confused and inaccurate idea of the law of criminal conspiracy, and in failing to distinguish between an unlawful act and a criminal one. It can never be a crime to combine to commit a lawful act, but it may be a crime for several to conspire to commit an unlawful act, which, if done by one individual alone, although unlawful, would not be criminal. Hence, the fact that the defendants associated themselves together to do the act complained of is wholly immaterial in this case. We have referred to this for the reason that counsel has laid great stress upon the fact of the combination of a large number of persons, as if that, of itself, rendered their conduct actionable. *Bowen v. Mattheson*, 14 Allen. 499; *Steamship Co. v. McGregor*, 23 Q. B. Div. 598, [1892] App. Cas. 25; *Parker v. Huntington*, 2 Gray, 124; *Wellington v. Small*, 3 Cush. 145; *Payne v. Railway Co.*, 13 Lea. 507.

5. With these propositions in mind, which bring the case down to a very small compass, we come to another proposition, which is entirely decisive of the case. It is perfectly lawful for any man (unless under contract obligation, or unless his employment charges him with some public duty) to refuse to work for or to deal with any man or class of men, as he sees fit. This doctrine is founded upon the fundamental right of every man to conduct his own business in his own way, subject only to the condition that he does not interfere with the legal rights of others. And, as has been already said, the right which one man may exercise singly, many, after consultation, may agree to exercise jointly, and make simultaneous declaration of their choice. This has been repeatedly held

as to associations or unions of workmen, and associations of men in other occupations or lines of business must be governed by the same principles. Summed up, and stripped of all extraneous matter, this is all that defendants have done or threatened to do, and we fail to see anything unlawful or actionable in it. *Com. v. Hunt, supra*; *Carew v. Rutherford*, 106 Mass. 1; *Steamship Co. v. McGregor*, [1892] App. Cas. 25.

Order reversed and injunction dissolved.*

VANDEBURGH, J., absent, took no part.

Trust, trade and labor combinations.—See, generally, the next three cases and notes. The case of *Deuber Watch Case Mfg. Co. v. E. Howard Watch & Clock Co.*, 24 N. Y. S. 647, (N. Y. Supreme Court, special term, Patterson, J.), presents some analogy to the principal case. The object of the suit was to recover damages for injury to the plaintiff's business. The defendants consisted of a large number of corporations, firms and individuals, engaged in the same line of business as the plaintiff. The decision was the overruling of a demurrer to the complaint. The complaint is not set out but its substance is thus given by the court: "In substance, the averments are that the defendant demurring and others were engaged in a business similar to that carried on by the plaintiff, and that the defendants entered into a conspiracy to break up or ruin the plaintiff's business, and that to accomplish such result an agreement was made among them that they would not sell any goods manufactured by them, or either of them, to any person, firm, association or corporation who thereafter shall buy or sell goods manufactured by the plaintiff; that the defendants, through an agent or agents employed by them, gave notice of this agreement to dealers in the articles referred to, who had previously dealt with manufacturers of the same articles, including the plaintiff; that many of such dealers thereupon refrained from buying goods of the plaintiff; that the defendants did, in fact, after the notice was given, refuse to deal with persons who had dealt with the plaintiff, and informed such persons that if they would promise not to buy or sell, or in any wise deal in, the wares manufactured by the plaintiff, then, and so long as such promise was kept, they might deal with the several defendants, but not otherwise; that the agreement among the several defendants also embraced a feature of enhancing prices, and was made with the intention of coercing the plaintiff to join them in a monopoly, and to crush competition; that there was a conspiracy and combination to ruin the plaintiff's business unless it would unite with defendants in an unlawful scheme; that, in consequence of the refusal of the plaintiff to confederate with the defendants in the promotion and furtherance of this alleged illegal scheme, the defendants and their agents have placed the plaintiff under a ban, have successfully intimidated its customers and diverted its business, and caused it enormous losses." The court says: "The claim is made that any dealer or associated dealers have a right to refuse to sell or buy from any particular person. That is

* Reported in 55 N. W. Rep. 119.

an incontrovertible rule of law in its general expression. There may be a right to fix prices, and crush out competition, in a legitimate business effort to do that, and nothing more, and to combine for that purpose, as was held in *Bowen v. Matheson*, 14 Allen, 499, and in the recent case of *Steamship Co. v. McGregor*, 21 Q. B. D. 544. But these cases are plainly distinguishable from this. In the *Steamship* case, Lord Colridge formulated the rule applicable to these causes. He says: "If the combination is unlawful, then the parties to it commit a misdemeanor, and are offenders against the state; and if, as the result of such unlawful combinations and misdemeanor, a private person receives a private injury, that gives such person a right of private action." By the statutes of this state it is a misdemeanor to commit any act injurious to trade or commerce. Penal Code, § 168, subd. 6. To combine to create a monopoly and to ruin all who will not unite in the undertaking is certainly injurious to trade and commerce, and in the case at bar, such, according to the allegations of the complaint, is what is charged. Here there is no mere combination to drive a competitor from the market by simply exercising a legal right. The real basis of the action is that, because the plaintiff would not unite with the defendants in doing an illegal thing, they, or some of them, willfully and maliciously confederated to ruin its business, and that some, or all of them, have partially succeeded in so doing. It is not a case, as the complaint stands, of the freedom of trade. There is not an appearance of a purpose on the part of the defendants to increase their own business, but only to crush out a rival who would not join with them, or some of them, in an asserted illegal purpose."

What the defendants in this case did, was to agree together not to sell their goods to certain dealers in a certain contingency. As this was something that each one might lawfully do separately, the doctrines of the principal case would make the motives or ultimate purposes of the act immaterial, as well as the combination to so act.

The Dueber Watch Case Mfg. Co. appears to have sued the same defendants in the federal court, and based its right to recover upon the federal anti-trust law of 1890. The declaration set up substantially the same facts, but was defective in some particulars necessary to bring it within the federal statute, which might have been cured by amendment. A demurrer to the declaration was sustained by Coxe, D. J., who says: "Is it an illegal act, within the provisions of the law in question, for two or more traders to agree among themselves that they will not deal with those who prefer to purchase the goods of another designated trader in the same business. Many perfectly legitimate reasons might be suggested for such an agreement. It is not a combination to monopolize; at least there is no statement of facts tending to show that it produced a monopoly in the present case. Indeed, it would seem that it must have had a contrary effect. There was surely nothing to prevent the plaintiff from supplying its customers with those things which the defendants declined to sell them, and thus enlarge its trade and stimulate competition. The plaintiff was perfectly free to engage in every branch of the watchmaking business. So were all others. The plaintiff's customers were free to purchase of the plaintiff, of the defendants, or of any other manufacturer. The contract of 1887 was not one in restraint of trade within any of the definitions or authorities which have been examined, and it is thought that the defendants' acts are not

reached by any section of the law in question. The construction contended for by the plaintiff would render each of the defendants liable to an indictment not only, but would make unlawful almost every combination by which trade and commerce seek to extend their influence and enlarge their profits. It would extend to every agreement where A and B agree that they will not sell goods to those who buy of C. It would strike at all agreements by which honest enterprise attempts to protect itself against ruinous and dishonest competition." *Dueber Watch Case Mfg. Co. v. E. Howard Watch and Clock Co.*, 55 Fed. Rep. 851.

In *Toledo, etc., R. Co. v. Pennsylvania R. Co.*, 54 Fed. Rep. 746, 756, it is said by Rider, J. : "An act, when done by an individual in the exercise of a right, may be lawful, but when done by a number conspiring to injure or improperly influence another may be unlawful."

UNITED STATES V. TRANS-MISSOURI FREIGHT ASSOCIATION, ET AL.

(Circuit Court of Appeals, Eighth Circuit. October 2, 1893.)

1. RAILROAD COMPANIES. COMBINATIONS TO REGULATE RATES AND FOR OTHER PURPOSES. PRINCIPLES OF CONSTRUCTION TO BE APPLIED TO THE FEDERAL ANTI-TRUST LAW. In construing the act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," three well settled rules must be applied to ascertain the meaning and scope of the act : (1). It must be read in the light of all general laws upon the same subject in force at the time of the passage of the act ; (2). When words have acquired a well understood meaning by judicial interpretation, it is to be presumed that they are used in that sense in a subsequent statute, unless the contrary clearly appears ; (3). Where Congress creates an offense, and uses common-law terms, the courts may properly look to that body of jurisprudence for the true meaning of the terms used, and, if it is a common-law offense, for the definition of the offense if it is not clearly defined in the act adopting or creating it.

2. THE CONTRACTS AND COMBINATIONS INTENDED BY THE FEDERAL ANTI-TRUST ACT ARE SUCH AS WERE ILLEGAL AT COMMON-LAW. From the principles of construction above laid down and the title of the act in question, it is clear that congress intended to declare as unlawful and criminal only such contracts and combinations as were then held to be illegal and void at common law.

3. GROUND OF ILLEGALITY AT COMMON-LAW. PUBLIC POLICY. Under the common law, the ground on which contracts in restraint of trade were declared unlawful was that they were against public policy. Public policy changes with the changing conditions of the times and it is the public policy of the present which the courts must ascertain and apply. The public policy of a nation is to be determined by its constitution, laws and judicial decisions.

4. CONTRACTS IMPOSING REASONABLE RESTRICTIONS UPON COMPETITION AND TRADE NOT AGAINST PUBLIC POLICY. At the time the anti-trust act was passed the rule had become firmly established in the jurisprudence of England and the

United States that the validity of contracts restricting competition was to be determined by the reasonableness of the restriction under the circumstances of each particular case. Public welfare is first considered, and, if the contract or combination appears to have been made for a just and honest purpose, and the restraint upon trade is not specially injurious to the public, and is not greater than the protection of the legitimate interest of the party in whose favor the restraint is imposed reasonably requires, the contract or combination is not illegal.

5. **THE QUASI PUBLIC CHARACTER OF RAILROAD CORPORATIONS DOES NOT EXCLUDE THEM FROM THE OPERATION OF THIS RULE.** There is nothing in the nature of railroad corporations or in the character of the business of transporting freight and passengers by rail that invalidates every contract imposing any restraint whatever upon competition in such business. On the contrary, contracts between such corporations, which imposed some restrictions upon competition, have been frequently sustained by our highest courts, and the rule has been often applied that the test of their validity was not the existence, but the reasonableness of the restrictions imposed.

6. **EFFECT OF THE INTERSTATE COMMERCE ACT IN MOULDING PUBLIC POLICY ON THIS SUBJECT.** Whatever the rule formerly was, the passage of the interstate commerce act evinces a public policy favorable to contracts between carriers which impose only reasonable restrictions upon competition and traffic, and such contracts are void only when, judged in the light of all the circumstances and conditions under which they were made, they unreasonably restrict competition.

7. **HEARING ON BILL AND ANSWER. EFFECT OF DENIALS AND AVERMENTS OF BILL AS TO PURPOSE AND EFFECT OF CONTRACT.** When a suit is heard on bill and answer the allegations of fact in the bill that are denied in the answer are to be taken as disproved, and the averments of fact in the answer stand admitted. Where the contract is admitted, but the allegations tending to show its sinister purpose, tendency, and effect contained in the bill are denied by the answer, and averments tending to show a just and honest purpose, tendency, and effect are made, the later averments contained in the answer stand admitted, and the contract will be presumed to have been made for an honest and legitimate purpose, unless the provisions of the agreement clearly show the contrary. In the examination of such a contract, fraud and illegality are not to be presumed.

8. **AGREEMENT CONSTITUTING THE TRANS-MISSOURI FREIGHT ASSOCIATION HELD VALID. NATURE OF THE AGREEMENT.** A contract between railroad companies forming a freight association that they will establish and maintain such rates, rules, and regulations on freight traffic between competitive points as a committee of their choosing shall recommend as reasonable; that these rates, rules, and regulations shall be public; that there shall be monthly meetings of the association, composed of one representative from each railroad company; that each company shall give five days' notice before some monthly meeting of every reduction of rates or deviation from the rules it proposes to make; that it will advise with the representatives of the other members at the meeting relative to the proposed modification, will submit the question of its proposed action to a vote at that meeting, and, if the proposition is voted down, that it

will then give ten days' notice that it will make the modification notwithstanding the vote before it puts the proposed change into effect; that no member will falsely bill any freight, or bill any at a wrong classification; and that any member may withdraw from the association on a notice of thirty days,—appears to be a contract tending to make competition fair and open, and to induce steadiness of rates, and is in accord with the policy of the interstate commerce act. Such agreement cannot be adjudged to be a contract or conspiracy in restraint of trade under the anti-trust act when it is admitted that the rates maintained under the same have been reasonable, and that the tendency has been to diminish, rather than to enhance, rates, and there is no other evidence of its consequences or effect. No monopoly of trade or attempt to monopolize trade within the meaning of the anti-trust act is proved by such a contract, nor do the railroad companies who are parties to such a contract thereby substantially disable themselves from the discharge of their public duties. **SHIRAS, D. J., dissenting.**

THIS is an appeal from a decree of the circuit court dismissing a bill brought by the United States against the Trans-Missouri Freight Association and eighteen railroad companies under the provisions of the act of congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the "Sherman Anti-Trust Act" (26 Stat. 209, c. 647; Rev. St. Supp. 762) to dissolve the association, and enjoin the railroad companies from fulfilling an agreement with each other to have and maintain joint rules, regulations, and rates for carrying freight between competing points on their several roads. The case was heard on the bill and the answers of the several defendants.

The bill alleges that the defendant railroad companies were corporations and common carriers, and that they owned independent and competing lines of railroad in that part of the United States west of the Mississippi and Missouri rivers; that they were engaged in transporting freight among the states and to and from foreign nations, and that they had been encouraged to construct and maintain these competing lines of railroad independent of each other by subsidies and grants of lands from the United States and the people of the states and territories west of these great rivers. The bill then alleges that, not being content with the rates of freight they were receiving, intending oppressively to augment those rates, to counteract the effect of free competition upon them, to establish and maintain arbitrary rates, and procure large sums of money from the people of those states and territories engaged in

over the railroads of the defendant companies were fixed by the association, and have since been maintained by them; that since that date these railroad companies have declined and refused at all times to fix or give rates for the carriage of freight based upon

"The jurisdiction of this association, in so far as the business of the Denver & Rio Grande and the Denver and Rio Grande Western Railway Companies is concerned, covers the following traffic, namely:

"All freight traffic to, from, or through all common or junction points in the states of Nebraska and Kansas and the Indian Territory, originating at or destined to Denver, Colorado Springs, Pueblo, or Trinidad.

"All freight traffic between Ogden, Spanish Fork, and intermediate points on the one hand, and to, from, or through points in Kansas or Nebraska upon or east of the 108d meridian, on the other hand.

"Traffic which may be excluded under the application of the above is only such as may be delivered to or received from the Denver & Rio Grande Railroad and Denver and Rio Grande Western Railway.

"(b) Traffic included in the Trans-Continental and International Association.

"(c) Traffic passing between points in Kansas or Nebraska and Mississippi river points, Carondelet and south; also traffic passing between points in Kansas or Nebraska and points in the southern states east of the Mississippi river and south of the south line of Kentucky and Virginia, regardless of the route by which the business crosses the Mississippi or Ohio rivers.

"(d) Traffic passing between Missouri river points and points in the territory east of said river.

"(e) All traffic to points on the Northern Pacific and Manitoba Railways.

"(f) Traffic to points in Arkansas.

"(g) Coal, stone, and gravel from Colorado, Wyoming, and Dakota, to points in Kansas and Nebraska, and to Sioux City, Council Bluffs, or Pacific Junction, Iowa, St. Joseph, Kansas City, or Boswell, Mo.

"(h) The interchange of traffic with the Colorado Midland and South Park Companies, to or from Aspen, Colorado, Glenwood Springs, Colorado, and intermediate points, including coal branches therefrom, and Buena Vista, Colorado, and Leadville, Colorado.

"(i) Business to and from Florence, Colorado, by all lines.

"ARTICLE II.

"Section 1. The association shall, by unanimous vote, elect a chairman of the organization. The chairman may be removed by a two-thirds vote of

the cost of constructing and maintaining their several lines of rail-

state commerce have been compelled to pay the arbitrary rates of freight, and to submit to the arbitrary rules and regulations established and maintained by the association formed under the agreement, and have been and are deprived of the benefits that

by a two-thirds vote that such rate was made in good faith to meet such competition, it shall be considered as authority for the rate so made.

"Sec. 7. All arrangements with connecting lines for the division of through rates relating to traffic covered by this agreement shall be made by authority of the association; provided, however, that when one road has a proprietary interest in another the divisions between such roads shall be what they may elect, and shall not be the property of the association: provided, further, that, as regards traffic contracts at this date actually existing between lines not having common proprietary interests, the same shall be reported so far as divisions are concerned, to the association, to the end that divisions with competing lines may, if thought advisable to them, be made on equally favorable terms.

"Sec. 8. It shall be the duty of the chairman to investigate all apparent violations of the agreement, and report his findings to the managers, who shall determine by a majority vote (the member against whom complaint is made to have no vote) what, if any, penalty shall be assessed, the amount of each fine, not to exceed one hundred dollars, to be paid to the association. If any line party thereto agrees with a shipper, or any one else, to secure a reduction or change in rates, or change in the rules or regulations, and it is shown upon investigation by the chairman that such an arrangement was effected, and traffic thereby secured, such action shall be reported to the managers, who shall determine, as above provided, what, if any, penalty shall be assessed.

"Sec. 9. When a penalty shall have been declared against any member of this association, the chairman shall notify the managing officer of said company that such fine has been assessed, and that within ten days thereafter he will draw for the amount of the fine; and the draft, when presented, shall be honored by the company thus assessed.

"Sec. 10. All fines collected to be used to defray the expenses of the association, the offending party not to be benefited by the amounts it may pay as
~~fines~~

"Sec. 11. Any member not present or fully represented at roll call of general or special meetings of the freight association, of which due and proper notice has been given, shall be fined one dollar, to be assessed against his company, unless he shall have previously filed with the chairman notice of ina-

might be expected to flow from free competition between the several lines of railroad of the defendant companies, and that in this way the defendant companies have combined in restraint of trade and commerce among the states, and have attempted to monopolize and have monopolized, a part of this commerce.

hereto on business covered by this agreement, and each of the parties hereto agrees to furnish such number of copies of the rates, rules, and regulations issued by it as the chairman may require.

"Sec. 3. He shall construe this agreement and all resolutions adopted thereunder, his construction to be binding until changed by a majority vote of the association.

"Sec. 4. He shall publish in joint form all rates, rules, or regulations which are general in their character and apply throughout the territory of the association, and shall also publish in the manner above such rates, rules, or regulations applying on traffic common to two or more lines as may be agreed upon by the lines in interest.

"Sec. 5. He shall be furnished with copies of all waybills for freight carried under this agreement when called for, and shall furnish such statistics as may be necessary to give members general information as to the traffic moved, subject to the provisions of the Interstate Commerce Railway Association agreement as to lines members thereof.

"Sec. 6. He shall render to each member of the association monthly statements of the expenses of the association, showing the proportions due from each, and shall make drafts on members for the different amounts thus shown to be due.

"Sec. 7. He shall hear and determine all charges of violations of this agreement, and assess, collect, and dispose of the fines for such violation as provided for herein.

"Sec. 8. The chairman shall be empowered to authorize lines in the association to meet the rates of another line or other lines in the association when in his judgment such action is justified by the circumstances; this, however, not to act in any way as an indorsement of an unauthorized rate made by any member.

"Sec. 9. Only parties interested shall vote upon questions arising under the agreement, and in case of doubt the chairman shall decide as to whether any party is so interested or not, subject to appeal, as provided by section 8 of article 8 of the agreement.

"ARTICLE IV.

"Any willful under-billing in weights or billing of freight at wrong classification shall be considered a violation of this agreement, and the rules and regulations of any weighing association or inspection bureau as established by it, or as enforced by its officers and agents, shall be considered binding under the provisions of this agreement, and any willful violation of them shall be subject to the penalties provided herein.

"ARTICLE V.

"The expenses of the association shall be borne by the several parties in

Three of the railroad companies were not members of the association, and will not be further noticed. The answers of the fifteen companies who were members of the association are substantially the same. The first defense in these answers is that the interstate commerce law of February 4, 1887, entitled "An act to regulate commerce," (24 Stat. 379, c. 104; Rev. St. Supp. 529) and the acts amendatory thereof, constitute a complete code of laws regulating that part of commerce among the states and with foreign nations which relates to transportation, and that the act of July 2, 1890, is not applicable to, and does not govern, them or their actions.

Coming to the merits of the suit, these defendants admit that they are common carriers; that, with some exceptions not important here, they owned independent and competing lines of railroad in that part of the United States west of the Missouri and Mississippi rivers, and that they were engaged in the transportation of freight among the states and territories, and to and from foreign nations, in that region, but they deny that they owned the only through lines of railroad engaged in that business there; and allege that there were several others, to wit, the Northern Pacific Railroad Company, the Great Northern Railway Company the

such proportion as may be fixed by the chairman. Any member not satisfied with the allotment so made may appeal to the association, which shall, at its first regular meeting thereafter, determine the matter, which may be done by a two-thirds vote of the members.

"ARTICLE VI.

"There shall be an executive committee of three members, to be elected by unanimous vote. The committee shall approve the appointment and salaries of necessary employees, except that of the chairman, and authorize all disbursements. All action of this committee shall be unanimous.

"ARTICLE VII.

"In case the managers of the lines parties hereto fail to agree upon any question arising under this agreement that shall be brought before the association, it shall be referred to an arbitration board, which shall consist of three members of the executive board of the Interstate Commerce Railway Association: provided, however, that, in case of arbitration in which the members of this association only are interested, they may, by unanimous vote, substitute a special board.

"ARTICLE VIII.

"This agreement shall take effect April 1, 1890, subject thereafter to thirty days' notice of a desire on the part of any line to withdraw from or amend the same."

are not sensibly diminished by furnishing poor facilities for transportation and inexpensive and mean accommodations. In 1887 congress recognized and adopted this rule of public policy, and by section 5 of "An act to regulate commerce," commonly called the "Interstate Commerce Act" (24 Stat. 379, c. 104; Rev. St. Supp. 529) prohibited such contracts between common carriers engaged in interstate or international commerce. That act, however, prohibited contracts for the pooling of freights of different and competing railroads only; it prohibited contracts that thus destroyed competition; it did not prohibit all contracts that in any way restricted or regulated competition. By the act of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly called the "Anti-Trust Act," (26 Stat. 209, c. 647; Rev. St. Supp. 762) congress provided that:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor.


"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize, any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor."

"Sec. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act."

The government bases this suit on these provisions of the latter act. It claims that the contract in question, and the association formed under it, are illegal on three grounds: First, because the contract prevents free and unrestricted competition between competing lines of railroad; second, because it tends to create a monopoly; third, because the railroad corporations have through this contract abandoned the discharge of some of their duties to the public.

The first ground stated is chiefly relied on, and it presents questions of deep interest, the decision of which must have a far-reaching and important influence on the transportation system of the nation.

The government does not claim that the contract and association assailed effected a pooling of freights, or that they tend to retard improvement in the facilities afforded for safe, quick, and convenient transportation, or that they are obnoxious to any of the provisions of the interstate commerce act; but it insists that the anti-trust act prohibits all contracts and combinations between competing railroad corporations which in any manner restrict free competition. The argument is, the anti-trust act prohibits any contract between competing railroad companies that restricts competition. This contract restricts competition; therefore it is illegal. Is, then every contract between competing railroad companies that in any manner imposes a restriction upon competition a "contract in restraint of trade" and illegal within the meaning of the anti-trust act? Is the existence of restriction upon competition the standard upon which the legality of these and all other contracts must be measured under the act? and, if not, by what standard shall their legality be determined? These are questions that the position of the government compels us to consider before we can determine whether or not this contract is void. Their determination demands a careful examination and construction of that part of the anti-trust act which declares that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states," is illegal. No definition of these terms is found in this act, but the terms are not new. For more than 200 years before it was passed the courts of England and America had from time to time declared that certain classes of contracts in restraint of trade were against public policy, and therefore illegal and void under the common law. The line of demarkation between these illegal contracts and the innumerable valid agreements that are daily made in the business world had been drawn by long lines of decisions, and had been repeatedly pointed out by the supreme court of the United States. *Gibbs v. Gas Co.*, 130 U. S. 396. 409; 9 Sup. Ct. Rep. 553; *Fowle v. Park*, 131 U. S. 88; 9 Sup. Ct. Rep. 658. Two years before its passage congress had enacted the interstate commerce law. They had there provided a code of rules and established a commission for the express purpose of regulating that part of interstate and international commerce which relates to transportation. Under these circum-



stances, three well-settled rules of construction must be applied to ascertain the meaning and scope of the act :

(1) It must be read in the light of all general laws upon the same subject in force at the time of the passage of the act.

(2) Where words have acquired a well understood meaning by judicial interpretation, it is to be presumed that they are used in that sense in a subsequent statute, unless the contrary clearly appears.

(3) Where congress creates an offense, and uses common-law terms, the courts may properly look to that body of jurisprudence for the true meaning of the terms used, and, if it is a common-law offense, for the definition of the offense if it is not clearly defined in the act adopting or creating it. *U. S. v. Armstrong*, 2 Curt. 446; *U. S. v. Coppersmith*, 4 Fed. Rep. 198; *In re Greene*, 52 Fed. Rep. 104, 111; *McCool v. Smith*, 1 Black, 459, 469; *McDonald v. Hovey*, 110 U. S. 619, 628; 4 Sup. Ct. Rep. 142.

Thus we are brought to a consideration of the statutes in force and the decisions that had been rendered when this act was passed to determine what contracts in restraint of trade were then illegal, for it is clear both from the rules to which we have referred and from the title of the act, viz: "An act to protect trade and commerce against unlawful restraints and monopolies," that it was such contracts, and such contracts only, that congress intended to declare unlawful and criminal in interstate commerce.

Under the common law, the ground on which contracts in restraint of trade are declared unlawful was that they were against public policy. But when it becomes necessary to consider grounds of public policy in the determination of a case, it is well to bear in mind the oft-quoted remarks of Justice Burrough in *Richardson v. Mellish*, 2 Bing. 252, that public policy "is a very unruly horse, and when you once get astride of it you never know where it will

public welfare in commercial and business transactions people of the last century who lived when commerce crept along the coasts, shut out of the interior by the absence of and hampered by an almost impassable ocean. In 1415 a debt was brought on an obligation by one John Dier, in the defendant alleged the obligation in a certain indenture he put forth, and on condition that if the defendant did not art of a dyer's craft, within the city where the plaintiff, e half a year, the obligation to lose its force, and that he did his art within the time limited. Hull, J., said: "In my c you might have demurred upon him that the obligation is inasmuch as the condition is against the common law; at *Dieu*, if the plaintiff were here, he should go to prison till l a fine to the king." Y. B., 2 Hen. V. fol. 5, pl. 26. In 184 Langdale, master of the rolls, held that a contract made by a not to practice his profession in Great Britain for twenty was not against public policy, and that it was valid. Wh v. Howe, 3 Beav. 383. In 1843, the court of exchequer he an agreement not to practice as a surgeon dentist in London or other town where the plaintiffs might have been practicir reasonable and lawful so far as it related to London, but public policy and void as to the other towns. Mallan v. M Mees. & W. 652, 667. In 1869, Vice Chancellor James su: a contract by vendors not to carry on or allow others to ca in any part of Europe the manufacture or sale of certain ki leather so as in any way to interfere with the exclusive enjo by the purchasing company of the manufacture and sale t and issued an injunction to enforce it. Cloth Co. v. Lorson 9 Eq. 345. In 1889 the supreme court of New York susta contract not to manufacture or sell thermometers or storm throughout the United States for ten years. Thermometer Pool, 51 Hun. 157, 163; 4 N. Y. Supp. 861. An in 188 supreme court held that a contract of a railroad corporation, the Pullman Southern Car Company the exclusive right to f all drawing room and sleeping cars required by that road du period of fifteen years was not an illegal restraint of trade, at tained it. Chicago, etc., R. Co. v. Pullman Southern Car Co U. S. 79; 11 Sup. Ct. Rep. 490. It is with the public policy day, as illustrated by public statutes and judicial decisions, t

ous cases where such expressions as the following are found in the opinions of the courts: "The people have a right to the necessities and conveniences of life at a price determined by the relation of supply and demand, and the law forbids any agreement or combination whereby that price is removed beyond the salutary influence of legitimate competition." *De Witt Wire Cloth Co. v. New Jersey Wire-Cloth Co.* (Com. Pl. N. Y.), 14 N. Y. Supp. 277. "It is against the general policy of the law to destroy or interfere with free competition or to permit such interference or destruction." *Stewart v. Transportation Co.*, 17 Minn. 372 (Gil. 348). "Combinations and conspiracies to enhance the price of any article of trade and commerce are injurious to the public." *People v. Fisher*, 14 Wend. 9. "Whatever destroys or even restricts, competition in trade is injurious, if not fatal, to it." *Hooker v. Vandewater*, 4 Denio, 349, 353. A careful and patient examination of the cases cited, however, discloses the fact that the contracts considered in those cases which are not of doubtful authority, were one of the classes to which we have referred, or rest upon some other ground than the existence of restriction upon competition. They were cases involving contracts of competing producers or dealers to limit the supply and enhance the price of, or to monopolize, staple commodities, like *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173; *India Bagging Ass'n v. B. Kock & Co.* 14 La. Ann. 168; *U. S. v. Jellico Mountain Coal & Coke Co.*, 46 Fed. Rep. 432; *Lumber Co. v. Hayes*, 76 Cal. 387; 18 Pac. Rep. 391; *De Witt Wire-Cloth Co. v. New Jersey Wire-Cloth Co.* (Com. Pl. N. Y.) 14 N. Y. Supp. 277; *Salt Co. v. Guthrie*, 35 Ohio St. 666; and *People v. North River Sugar Refining Co.*, 54 Hun. 354; 7 N. Y. Supp. 406; or cases involving pooling contracts, like *Craft v. McConoughy*, 79 Ill. 346; *Hooker v. Vandewater*, 4 Denio, 349; *Stanton v. Allen*, 5 Denio, 434; *Anderson v. Jett* (Ky.), 12 S. W. Rep. 670; *Gibbs v. Gas Co.*, 130 U. S. 396; 9 Sup. Ct. Rep. 553; *Morrill v. Railroad Co.*, 55 N. H. 531; *Denver & N. O. Ry. Co. v. Atchison T. & S. F. R. Co.*, 15 Fed. Rep. 650; and *Woodruff v. Berry*, 40 Ark. 252; or cases involving combinations of workmen which compelled non-members to abide by the prices for labor which they had fixed or to abandon their employment, like *People v. Fisher*, 14 Wend. 9, and *U. S. v. Workingmens*

they deprived the party restrained from his livelihood and the subsistence of his family, and the public of a useful member. The point actually decided, that contracts in partial restraint of trade may be sustained, has been uniformly approved, but in the development of the law applicable to this subject there has been added to it the further condition that the restriction imposed must be reasonable in view of all the facts and circumstances of each particular case. The remark of Chief Justice Parker that contracts in general restraint of trade are illegal — a remark that was not necessary to the determination of the question before him — has been, to say the least, greatly modified by subsequent decisions. There is a plain tendency in the later authorities to repudiate the proposition that there is any hard and fast rule that contracts in general restraint of trade are illegal, and to apply the test of reasonableness to all contracts, whether the restraint be general or partial. In *Tallis v. Tallis*, 1 El. & Bl. 391, the court of queen's bench held, in 1853, that a covenant restricting competition, which bound the covenantor not to exercise his trade of a canvassing publisher in London or within 150 miles of the general post office or in Dublin or Edinburgh, or within 50 miles of either, or in any other town where the covenantee or his successors had an establishment or might have had one within six months preceeding, was not an illegal restraint of trade, and enforced it. In *Mogul Steamship Co. v. McGregor, Gow & Co.*, 21 Q. B. Div. 544, certain ship owners engaged in the carrying trade between London and China had formed an association for the purpose of keeping up the rate of freights in the tea trade, and securing that trade to themselves. They accomplished this purpose by allowing a rebate of five per cent. on all freights paid by shippers who shipped in their vessels only and thus partially or entirely excluded the plaintiffs, who were competing ship owners, from the tea-carrying trade. The latter brought suit for an injunction and damages, but, notwithstanding the obvious restriction upon free competition, Lord Coleridge held that the association was not an unlawful combination in restraint of trade, and gave judgment for the defendants. This decision was rendered in 1888. It was sustained on appeal (23 Q. B. Div. 598), and finally affirmed by the house of lords (App. Cas. 1892 p. 25). In *Perkins v. Lyman*, 9 Mass. 522, the supreme judicial court of Massachusetts held in 1813, that a contract by a merchant

not to be interested in any voyage to the northwest coast of America was not invalid as in restraint of trade. In *Match Co. v. Roeber*, 106 N. Y. 473 ; 18 N. E. Rep. 419, a contract of a match manufacturer never to manufacture or sell any friction matches in the District of Columbia, or in any part of the United States except Idaho and Montana, was sustained and enforced. In *Navigation Co. v. Winsor*, 20 Wall. 64, decided in 1873, a contract between two steam navigation companies engaged in the business of transportation on the rivers, bays, and waters of California, and on the Columbia river and its tributaries, respectively, was declared by the supreme court not to be in restraint of trade, although it prohibited the use of a certain steamer in the waters of California for ten years. And in 1890 the supreme court of New Hampshire in an exhaustive and persuasive opinion held that contracts by which a railroad corporation leased its road and rolling stock to a competitor for many years were not necessarily against public policy or void at common law, when the purpose of the contracts and combinations did not appear to be to raise the rate of transportation above the standard of fair compensation, or to violate any duty owing to the public by noncompeting companies. *Manchester, etc., R. Co. v. Concord R. Co.*, (N. H.) 20 Atl. Rep. 383. If further authority is wanted for the proposition that it is not the existence of the restriction of competition, but the reasonableness of that restriction, that is the test of the validity of contracts that are claimed to be in restraint of trade, it will be found in *Fowle v. Park*, 181 U. S. 88, 97 ; 9 Sup. Ct. Rep. 658 ; *Gibbs v. Gas Co.*, 130 U. S. 396 ; 9 Sup. Ct. Rep. 553 ; *In re Green*, 52 Fed. Rep. 104, 118 ; *Horner v. Graves*, 7 Bing. 735, 743 ; *Hubbard v. Miller*, 27 Mich. 15, 19 ; *Rousillon v. Rousillon*, 14 Ch. Div. 851, 863 ; *Cloth Co. v. Lonsont L. R.* 9 Eq. 345, 354 ; *Wickens v. Evans*, 3 Younge & J. 318 ; *Ontario Salt Co. v. Merchants Salt Co.*, 18 Grant, Ch. 540 ; *Mallan v. May*, 11 Mees. & W. 652, 657 ; *Whittaker v. Howe*, 3 Beav. 383 ; *Kellogg v. Larkin*, 3 Pin. 123, 150 ; *Beal v. Chase*, 31 Mich. 490 ; *Skraunka v. Scharringhausen*, 8 Mo. App. 522, 525 ; *Wiggins Ferry Co. v. Chicago & A. R. Co.* 73 Mo. 389 ; *Gloucester Isinglass & Glue Co. v. Russia Cement Co.*, 154 Mass. 92, 94 ; 27 N. E. Rep. 1005 ; *Thermometer Co. v. Pool*, 51 Hun, 157, 163 ; 4 N. Y. Supp. 861 ; *Association v. Walsh*, 2 Daly, 1 ; *Hodge v. Sloan*, 107 N. Y. 244 ; 17 N. E.

Rep. 335; *Brown v. Rounsavell*, 78 Ill. 589; *Jones v. Clifford's Ex'r*, 5 Fla. 510, 515.

From a review of these and other authorities, it clearly appears that when the anti-trust act was passed the rule had become firmly established in the jurisprudence of England and the United States that the validity of contracts restricting competition was to be determined by the reasonableness of the restriction. If the main purpose or natural and inevitable effect of a contract was to suppress competition or create a monopoly, it was illegal. If a contract imposed a restriction that was unreasonably injurious to the public interest, or a restriction that was greater than the interest the party in whose favor it was imposed demanded, it was illegal. But contracts made for a lawful purpose, which were not unreasonably injurious to the public welfare, and which imposed no heavier restraint upon trade than the interest of the favored party required, had been uniformly sustained, notwithstanding their tendency to some extent to check competition. The public welfare was first considered, and the reasonableness of the restriction determined under these rules in the light of all the facts and circumstances of each particular case.

But it is said that railroad corporations are quasi public corporations, and any restriction upon their competition is against the public policy of the nation. It is not to be denied that there are some expressions to be found in adjudged cases, notably in *Gibbs v. Gas Co.*, 130 U. S. 396, 409; 9 Sup. Ct. Rep. 558; *West Virginia Transp. Co. v. Ohio River Pipe Line Co.*, 22 W. Va. 600, 625; *Chicago Gaslight & Coke Co. v. People's Gaslight & Coke Co.*, 121 Ill. 530; 13 N. E. Rep. 169; and *W. U. Tel. Co. v. American Union Tel. Co.*, 65 Ga. 160,—to the effect that where a business is of such character that it cannot be restrained to any extent whatever without prejudice to the public interests, the courts decline to enforce or sustain contracts imposing such restraint, however, partial. But the language employed by the courts in these cases should be read in the light of the circumstances under which it was uttered, and with due reference to the point actually adjudicated. Thus in the earliest of these cases (*W. U. Tel. Co. v. American Union Tel. Co.*) it was held that a contract between a railroad company and a telegraph company by which the former granted to the latter the exclusive right to construct a telegraph

line along its right of way, necessarily excluded all other telegraph lines from the use of a right of way that by condemnation had been devoted to public uses, and was void because it was in restraint of trade, and tended to create a monopoly. In *West Virginia Transp. Co. v. Ohio River Pipe Line Co.* it was held that an owner of 2,000 acres of oil land could not grant to one pipe line company an exclusive right to lay a pipe line across said lands, because the legislature, by authorizing pipe line companies to condemn lands for the construction of such lines, had thereby declared that the public had an interest in their construction, and that a contract which precluded such companies from laying a line across an extensive tract of land was necessarily opposed to public policy. In *Chicago Gaslight & Coke Co. v. People's Gaslight & Coke Co.*, the court held that a gas company, which had accepted a charter authorizing it to lay pipes and to supply gas throughout the entire limits of the city, could not disable itself from the performance of the public duty it had undertaken by entering into a contract with another company not to lay pipes and supply gas in a large section of said city. And in *Gibbs v. Gas Co.* a like contract by one gas company with another to abandon the discharge of public duties which had been devolved upon it by its charter was held, on that account, to be against public policy, and void, and to be void on the further ground that the contract was in open violation of a statute which prevented the company from "entering into a * * * contract with any other gas company whatever."

No doubt can be entertained that the contract involved in each of the cases last referred to was against public policy for its marked tendency to create a monopoly, and to suppress healthy competition. Two of the contracts were also vicious in the respect that the corporation had attempted to disable itself from exercising powers which had been conferred upon it for the public advantage. But we think, in view of the state of facts on which the decisions were predicated, and the points actually adjudicated, it would be unwise to deduce an unbending rule that any and every contract between two railway companies which enjoins or contemplates concert of action in the matter of establishing freight or passenger rates between competitive points is against public policy, and an unlawful restraint of trade. No, case, we believe, has yet

gone to that extent, or has declared that the business of transporting freight and passengers by rail is of such character that restraint whatever upon competition therein is permissible. the contrary, contracts between common carriers which impose some restrictions upon competition have been frequently sustained by our highest courts, and the rule has been often applied that test of their validity was not the existence, but the reasonableness of the restriction imposed. *Navigation Co. v. Winsor*, 20 W 64; *Chicago, etc., R. Co. v. Pullman Southern Car Co.*, 139 U 79; 11 Sup. Ct. Rep. 490; *Mogul Steamship Co. v. McGregor & Co.*, 21 Q. B. Div. 544; *Manchester, etc., R. Co. v. Conger R. Co.* (N. H.) 20 Atl. Rep. 383; *Wiggins Ferry Co. v. Chicago A. R. Co.*, 73 Mo. 389. But even if such an extreme view, as above indicated, was once tenable, we fail to see how it can well be maintained since the passage of the interstate commerce law, and the action that has been taken thereunder by the government commission which was created to enforce its provisions. The interstate commerce law imposes several important restrictions upon the right of railway companies to do as they please in the matter of making and altering rates, and congress has thereby expressed its conviction that unrestrained competition between carriers is not, at the present time, and under existing conditions, most conducive to the public welfare, but that other things are quite essential to the public good. Mark the difference in public policy towards merchants and railroad companies exhibited by the common law and by the interstate commerce act. Merchants may refuse to sell their wares at all, they may refuse to transact any business; but railroad companies are common carriers; they must furnish transportation when requested; they must operate the roads or forfeit their franchises; merchants may charge any price they see fit for their wares, but railroad companies are restricted to reasonable and just charges for transportation (Interstate Commerce Act, § 1); merchants may sell articles of like character at different values for as many different prices as they have different customers, but railroad companies are restricted to the same charges to all their customers for like services (*Id.* § 2); merchants may give to any customers or any localities any preference or advantage they choose over other customers or localities, but railroad companies are prohibited from giving any undue preference or advantage to

any party or place, (Id. § 3); merchants may sell articles of inferior value for higher prices than those they charge and receive for those of greater value, but railroad companies are prohibited from charging or receiving a greater compensation for a short haul than for a long haul (Id. § 4); merchants may keep their prices secret; railroad companies must publish their rates for transportation, and are prohibited from charging or receiving a greater or less compensation than that specified in the published schedules (Id. § 6); merchants may change their prices instantly and without notice, railroad companies are prohibited from increasing their rates except after ten days' public notice or from decreasing them except after three days' public notice (Id. § 6); merchants may transact their business free from the supervision or interference of the government; but railroad companies are subject to the supervision of a commission, established by the government, authorized to take the necessary proceedings for the enforcement of these restrictions (Id. § 12). These restrictions relate almost exclusively to rates for the transportation of freight and passengers. They are numerous, radical, and effective. They became operative by an act of congress three years before the anti-trust act was passed, and they establish beyond cavil that from that date the public policy of the nation was that competition between railroad companies engaged in interstate commerce should not go wholly unrestricted.

If we turn now to the published reports of the interstate commerce commission, whose opinion on such matters is certainly entitled to great consideration, we find the view even more clearly expressed that it was the purpose of congress to place important restraints upon competition, that uncontrolled struggles for patronage by railway carriers are frequently detrimental to the public welfare that rate wars are especially injurious to the business interests of the country and contrary to the spirit of existing laws, that the interstate commerce act invites conferences between railway managers, and that concert of action in certain matters by railway companies is absolutely essential to enable it to accomplish its true purpose.

In the fourth annual report of the commission, at page 19, we find the following statement: "It is thus seen at every turn that the regulation of rates on a consideration of the pecuniary or other situation of any single road and without a survey of the whole

possible, so that the public may have, in the services performed, all the benefits and conveniences that might be expected to follow from general federation. There is nothing in the existence of such arrangements which is at all inconsistent with earnest competition. They are of general convenience to the carriers as well as to the public, and their voluntary extension may be looked for until, in the strife between roads, the limits of competition are passed, and warfare is entered upon. But, in order to form them, great mutual concessions are often indispensable, and such concessions are likely to be made when relations are friendly, but are not to be looked for when hostile relations have been inaugurated."

In the first annual report on page 33, the commission further said: "To make railroads of the greatest possible service to the country, contract relations would be essential, because there would need to be joint tariffs, joint running arrangements and interchange of cars, and a giving of credit to a large extent, some of which were obviously beyond the reach of compulsory legislation, and, even if they were not, could be best settled, and all the incidents and qualifications fixed, by the voluntary action of the parties in control of the roads respectively. Agreement upon these and kindred matters became, therefore, a settled policy, and short independent lines of road seemed to lose their identity, and to become parts of great trunk lines, and associations were formed which embraced all the managers of roads in a state or section of the country. To these associations were remitted many questions of common interest, including such as are above referred to. Classification was also confided to such associations, it being evident that differences in classification were serious obstacles to a harmonious and satisfactory interchange of traffic. But what perhaps more than anything else influenced the formation of such associations, and the conferring upon them of large authority, was the liability, which was constantly imminent, that destructive wars of rates would spring up between competing roads to the serious injury of the parties and the general disturbance of business. Accordingly, one of the chief functions of such associations has been the fixing of rates, and devising of means whereby their several members can be compelled or induced to observe the rates when fixed."

It would extend this opinion to an unreasonable length if we

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assumed to state the reasons which probably influenced to impose some restrictions upon competition in the matter of way transportation, and to place the railway carriers under the operation of a law which, for its successful execution as required by the interstate commerce commission, seems to seem to invite conference and concert of action. It is likewise necessary for us to state the reasons why railroad companies should be accorded the privilege of entering into arrangements with other companies which may, to some extent, regulate competition. Reasons to that effect have been stated with great ability and persuasive force in some of the cases to which we have already referred, notably in *Manchester, etc., R. Co. v. Concord R. Co.*, *supra*. Without entering into that discussion, it is sufficient to say that in our judgment, there was no hard and fast rule in force when the anti-trust act was enacted which made every contract entered into by railroad companies void on grounds of public policy if it interfered with free competition. In our judgment, the more reasonable doctrine then prevailed, especially in view of the recent passage of the interstate commerce act, that such contracts were valid if, when judged in the light of all the circumstances and conditions under which they were made, they unreasonably restricted competition.

In view of the foregoing principles, it remains for us to decide whether the contract which is alleged to be in violation of the anti-trust act, but before doing so a preliminary observation will not be out of place. The anti-trust act is a criminal statute, and it should not be so construed as to subject persons to the penalties thereof unless the contract complained of is one that is within the provisions of the statute. It is also well to remember that the case comes before us simply on bill and answer. The bill alleges that its purpose, and that of the association formed under it, was to suppress competition, enhance rates of freight, and monopolize the traffic. The answers deny these averments, and allege that the purpose of the contract and association was to carry out the provisions of the interstate commerce act, and to maintain rates public and steady. The bill alleges that the effect of the contract and association has been to raise the rates of freight above those which the public might have reasonably expected to pay under free competition. The answers deny this allegation, and allege that the effect has been to maintain reasonable rates, and

more than 200 reductions of rates have been effected through the association. Upon a hearing on bill and answer the averments of fact contained in the bill are overcome by the denials of the answer, and the averments of fact in the answer stand admitted. *Tainter v. Clark*, 5 Allen, 66; *Brinckerhoff v. Brown*, 7 Johns Ch. 217; *Perkins v. Nichols*, 11 Allen, 542.


The result is that the government's right to relief here rests upon the contract itself, and the fact that the rates maintained under it have not been unreasonable, and that many reductions have been made under its operation. The ordinary rules of interpretation must then be applied to the language of this contract, and, if it appears that its purpose and tendency were to unreasonably restrict competition, it must be declared illegal. *Dillon v. Barnard*, 21 Wall. 430, 437; *Interstate Land Co. v. Maxwell Land Grant Co.*, 139 U. S. 569, 577; 11 Sup. Ct. Rep. 656.

In construing the contract it must also be remembered that fraud and illegality are not to be presumed, and that the purpose of the contract is that which is clearly manifest by its terms. In *Mitchell v. Reynolds*, *supra*, the unfortunate remark "that wherever such contract *stat indifferenter*, and for aught appears, may be either good or bad, the law presumes it *prima facie* to be bad," fell from Chief Justice Parker. This seems to be the reverse of the proposition that every man is presumed to be innocent until he is proved to be guilty. It has long been repudiated by the courts of England and America. The burden is on the party who seeks to put a restraint upon the freedom of contract to make it plainly and obviously clear that the contract is against public policy, and the true rule of construction is that neither fraud nor illegality is to be presumed, but the contract is to be assumed to have been made in good faith for the purpose which appears on the face of it, and not colorably for any other. *Registering Co. v. Sampson*, L. R. 19 Eq. 462; *Tallis v. Tallis*, 1 El. & Bl. 391; *Rousillon v. Rousillon*, 14 Ch. Div. 351, 365; *Stewart v. Transportation Co.*, 17 Minn. 372, 391 (Gil. 348); *Marsh v. Russel*, 66 N. Y. 288; *Phippen v. Stickney*, 3 Metc. (Mass.) 384, 389.

Proceeding then, to an examination of the contract, we find it to be substantially as follows: In the preamble there is a declaration that the association is formed for "mutual protection by establishing and maintaining reasonable rates, rules, and regulations,

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both through and local." Article 1 declares that substantial traffic competitive between two or more members in that part of the United States between the Mississippi and Missouri rivers and the Pacific ocean shall be governed by the association. It is provided by article 2 that the association shall choose a chairman by unanimous vote; that there shall be regular monthly meetings of the association, in which each member must be represented by some responsible officer authorized to act definitely on all questions to be considered; that a committee shall be appointed to establish rates, rules, and regulations for the traffic, and that the same shall be put into effect; that any railroad company may give ten days' written notice prior to any monthly meeting of any proposed reduction of rates or change of rules, and eight days' notice as to the traffic of Colorado or Utah; that thereupon the reduction or change shall be considered and voted upon by the association at the next monthly meeting, and all members shall be bound by the decision of the association." "unless then and there the parties shall give the association definite written notice that in ten days thereafter they shall make such modification notwithstanding the vote of the association;" that any member may without notice at its peril, make any rate, rule, or regulation necessary to meet the competition of outside lines, subject to a liability to pay a penalty of \$100 if the association decides by a two-thirds vote that the rate, rule, or regulation was not necessary for that purpose; that all arrangements with connecting lines for the division of through rates relating to traffic covered by the agreement shall be made by authority of the association, and that the chairman of the association shall punish violations of the agreement by fine not exceeding \$100 in any case. Article 3 makes the chairman the executive officer of the association, requires him to publish and furnish to the members of the association the rates, rules, and regulations established, and all changes in them, and requires him to enforce the provisions of the contract. Article 4 prohibits under-billing or billing at a wrong classification. Articles 5 and 6 provide for the appointment of the necessary employees and the payment of the necessary expenses of the association. Article 7 provides for arbitration in case the managers of the parties to the agreement fail to agree upon any question arising under it; and article 8 provides that any member may withdraw from the association on thirty days' notice.



It is obvious at a glance that this agreement is not affected by any of the vices of an ordinary pooling contract. The income of each member of the association under the terms of the agreement is still measured by the amount of freight and the number of passengers it carries, and it is still to the interest of each member of the association to make that patronage as great as possible, by affording to the public superior facilities for safe, speedy, and convenient transportation. Under the operation of the agreement, each company must still compete with its associate members in the character of its roadbed, quality of its equipments, length of route, convenience of its terminal facilities, and in the efficiency of its management, for all of these considerations will necessarily have a marked influence upon the amount of its patronage.

In other of its features, also, the contract is not subject to criticism. In these days, when persons engaged in many other callings and avocations are in the habit of meeting at intervals, as associations for the purpose of cultivating more friendly relations and establishing regulations conducive to the general welfare of the trade, it is difficult to see upon what just grounds representatives of railway companies can be denied the right of forming associations for the purpose of friendly conference and to formulate rules and regulations to govern railway traffic. The fact that the business of railway companies is irretrievably interwoven, that they interchange cars and traffic, that they act as agents for each other in the delivery and receipt of freight and in paying and collecting freight charges, and that commodities received for transportation generally pass through the hands of several carriers, renders it of vital importance to the public that uniform rules and regulations governing railway traffic should be framed by those who have a practical acquaintance with the subject, and that they should be promulgated and faithfully observed. The advisability of establishing such rules and regulations in the mode above indicated, particularly for the uniform classification of freight, has been frequently pointed out in the reports of the interstate commerce commission. Indeed, the benefits that would result from uniform rules and regulations, and from uniformity in the classification of freight, seem to us so obvious that we need not stop to enumerate them.

We are of the opinion, therefore, that the stipulations of this

agreement enjoining a monthly conference between representatives of the various members of the association, and the appointment of a committee to formulate rules and regulations governing the traffic embraced by the agreement, are not only not opposed to public policy, but, if faithfully carried out, will tend to promote the public interests. It is also obvious, we think that the stipulation requiring five days' written notice of a proposed reduction in rates does not, in and of itself, render the contract unlawful. It is certain that a contract not to reduce established rates without a public notice of three days, and not to increase them without a notice of ten days, would not be against public policy, because the interstate commerce act has prohibited such changes with less notice. The plain object of this provision was to prevent competitors from resorting to secret, unfair, and ruinous methods of warfare, to make competition fair and open, and to enable shippers to modify their action to suit the coming changes. There is no purpose of the provision, or of the policy that dictated it, that would not be as well, if not better, served by a notice of fifteen or forty days, as one of three days.

But it is urged that the contract in question restrains competition in rates, and is therefore unlawful. That it does have some tendency to check competition in that respect will not be denied; but that the restraint imposed is slight, that there is abundant room within the terms of the agreement for the play of all the healthy forces of competition, and that it has a pronounced tendency to prevent sudden and violent fluctuations in rates, commonly termed "rate wars," seems to us to be equally manifest. It is not reasonable to suppose that any member of the association which, by virtue of its situation, can really afford to transport freight or passengers between any two competitive points for a substantially less sum than its competitors, will be likely to forego the advantage that its situation gives it, even under the operation of the agreement. It is much more probable that under the operation of the agreement, as under the influence of free competition, the rates between competitive points will be largely, if not entirely, based upon the rate which the road having the shortest line and best facilities esteems fair and reasonable compensation.

It will be observed that under the terms of the agreement no mem-

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ber of the association has bound itself to be governed by a rate fixed by a vote of the majority for a longer period than ten days after the monthly meeting next succeeding its notification of a proposed change in rates; and for that reason the limitation imposed by the contract upon the right of a member of the association to adopt such a rate as it sees fit is very slight, and the power reposed in the association is correspondingly small. We fail to see, therefore, that the natural or probable effect of this contract will be to sensibly raise either freight or passenger rates above the level which they would attain under the influence of what is termed "unrestricted competition." On the other hand, it seems highly probable that the contract in question will prevent sudden and violent fluctuations in freight rates, such as often upset the business calculations of entire communities, and that this was one of the main reasons which led to the formation of the association. We are also persuaded that it will have a sensible tendency to induce a more uniform system of classification throughout the great region where the association operates, and also to induce the establishment of a more perfect code of rules and regulations governing freight traffic.

It may also tend to prevent stealthy, secret and unfair methods of warfare, and to make the strife for patronage among the members of the association open, fair, and honorable. All of these are objects that are in line with the true spirit of the interstate commerce act and an intelligent public policy.

The result is that this contract in view of all the circumstances of the case and the situation of the parties thereto, does not impose such unreasonable restraints on competition as will warrant us in holding that it is one of those contracts or conspiracies in restraint of trade and commerce among the several states which fall within the inhibition of the anti-trust act of July 2, 1890.

Nor is there any monopoly of trade, or any attempt to monopolize trade, within the meaning of that act, evidenced by this contract. So far as can be learned from it, the association has never intended to have and never has had or attempted to have, any trade. It has not held or attempted to obtain or hold any property except the moneys necessary for the bare expenses required to pay its officers and employees.

It has been and is a mere adviser with its members upon disputed questions submitted by the contract to its consideration.

So far as can be learned from the contract, each member of the association is striving with every other in its territory, whether a member of the association or not, to divert from the latter and gather to itself all possible trade. There are provisions in the contract that the chairman may authorize members to meet the rates of competitors who are not members of the association, and that any member may meet the rates of such a competitor at its peril but these provisions were necessary for the protection of members of the association against the attacks of non-members.

Without such provisions unreasonably low rates established by the latter would draw away the business of the members, and deprive them of the opportunity to compete on equal terms. These provisions give no company any higher right or greater power than it had before the contract was made, but simply reserved to each the privilege of exercising its original right to meet competition without giving the fifteen days notice in case of a warfare upon it by a non-member.

A monopoly of trade embraces two essential elements: (1) The acquisition of an exclusive right to, or the exclusive control of, that trade and (2) the exclusion of all others from that right and control. There is nothing in this contract indicating any purpose or attempt to obtain such a monopoly. The great transportation systems of the Great Northern Railway Company, the Northern Pacific Railroad Company, the Southern Pacific Railroad Company, and the Texas Pacific Railroad Company were operated in the region subject to the regulations of this association, but none of these companies were members of it; and, even if they had been there would still have been no evidence of any attempt to monopolize trade here, because each member is left to compete with every other for its share of the traffic. *In re Greene*, 52 Fed. Rep. 104, 115.

The position that these railroad companies have so far disabled themselves from the performance of their public duties by the execution of this contract as to give ground for the avoidance of the contract, and for a forfeiture of their franchises, cannot be successfully maintained. It is well settled upon principle and authority that, where a corporation by a contract entirely or substantially disables itself from the performance of the duties to the public imposed upon it by the acceptance of its charter, the contract is

void, and its franchise may be forfeited. The reasons for this rule, and some of the limitations of it, were stated by this court in *Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co.*, 51 Fed. Rep. 809, 317-321; 2 C. C. A. 174, 230-235; and it is unnecessary to repeat them here. It goes without saying that this rule in no way limits the power of a corporation to discharge its duties through agents of its own selection. There is no doubt that each of these corporations could lawfully appoint an expert or a committee of experts upon the subject of classification and rates of freight upon its road, empower him or them to fix the rates, and then maintain them for forty days unchanged. Practically the fifteen representatives of these companies, at a meeting of the association, their chairman and their committee that originally fixed the rates and rules, together constitute an advisory committee on rates and rules of traffic, composed of men whose intimate knowledge of the needs of the shippers, and of the character and quantities of the commodities transported through the different portions of the wide area traversed by these railroads, and whose wide experience in the effect of various rates upon the accommodation of the public and the business of the companies fit them well to carefully consider and wisely establish just and reasonable rates throughout this territory. Such a committee each company acting independently might have appointed, and it is not perceived that the fact that two or more companies appoint the same men to establish rates and rules for the traffic upon their respective roads in any way invalidates the appointment of either. Moreover, the power delegated to the association, its committee and chairman, is so limited in extent and so restricted in time that it is hardly worthy of serious consideration as the ground for the avoidance of a contract and the forfeiture of a franchise. The power granted to the committee originally chosen to establish the rates and rules expired by limitation upon a thirty days' notice of withdrawal from the association; the power of the association itself to prevent modifications and changes in the rules and rates established ceases after fifteen days, notice of an intention to make the modifications and changes notwithstanding its action. It is true that there is a provision in the second article of the agreement that regular meetings of the associations shall be held, "unless notice shall be given by the chairman that the business to be transacted does not warrant calling the

members together," but the remark of the counsel for the government that this gives the chairman power to prevent the consideration of proposed changes in rates, and thus to maintain them indefinitely by preventing a meeting of the association, cannot be seriously considered. The effect of the contract is that, when a company gives notice of a proposed change of any importance, the meeting shall be held. Such a notice presents business to be transacted that does warrant calling the members together. If, under such circumstances, the chairman gives notice that there is no such business, he violates the contract. The presumption is that he will not violate it; and, if he does do so, that is no ground for an avoidance of the contract.

The result is that neither this contract nor the association formed under it can be held to be obnoxious to the provisions of the anti-trust act in view of the facts admitted by the pleadings in this suit, and in the absence of other evidence of their consequences and effect.

Many of the considerations to which we have referred are presented upon the argument of the question whether or not the anti-trust act applies to or in any way governs transportation companies that are engaged in that part of interstate and international commerce which consists solely of the transportation of persons and property, in view of the very substantial regulation of this part of commerce provided by the interstate commerce act. The views we have expressed render it unnecessary to determine this question, and we express no opinion upon it. We rest this decision on the ground that, if the anti-trust acts applies to and governs interstate and international transportation and its instrumentalities, the contract and association here in question do not appear to be in violation of it.

The decree below is affirmed, without costs.

THAYER, D. J., concurs.

SHIRAS D. J., (dissenting.) I am unable to concur in the conclusion reached by the majority of the court in this case, and propose to state the reasons for such nonconcurrence.

Assuming that the anti-trust act of July 2, 1890, is applicable to interstate railroad companies and the business transacted by them, it seems to me entirely clear that the contract entered into

purpose of engaging therein. Thus in *Gibbs v. Gas Co.*, 130 U. S. 396, 9 Sup. Ct. Rep. 553, the supreme court, in speaking by Mr. Chief Justice Fuller, declared that—"The supplying of illuminating gas is a business of a public nature to meet a public necessity. It is not a business like that of an ordinary corporation engaged in the manufacture of articles that may be furnished by individual effort. * * * Hence, while it is justly urged that those rules which say that a given contract is against public policy should not be arbitrarily extended so as to interfere with the freedom of contract, (*Registering Co. v. Sampson*, L. R. 19 Eq. 462,) yet in the instance of business of such character that it presumably cannot be restrained to any extent whatever without prejudice to the public interest, courts decline to enforce or sustain contracts imposing such restraint, however partial, because in contravention of public policy. This subject is much considered, and the authorities cited, in *West Virginia Transp. Co. v. Ohio River Pipe Line Co.*, 22 W. Va., 600; *Chicago Gaslight & Coke Co. v. People's Gaslight & Coke Co.*, 121 Ill. 530, 13 N. E. Rep. 169; *Western Union Tel. Co. v. American Union Tel. Co.*, 65 Ga. 160. * *

* Innumerable cases, however, might be cited to sustain the proposition that combinations among those engaged in business impressed with a public or quasi public character, which are manifestly prejudicial to the public interest, cannot be upheld."

In *West Virginia Transp. Co. v. Ohio River Pipe Line Co.*, 22 W. Va. 600, it is said: "If there be any sort of business which from its peculiar character can be restrained to no extent whatever without prejudice to the public interest, then the courts would be compelled to hold void any contract imposing any restraint, however partial, on this peculiar business, provided, of course, it be shown clearly that the peculiar business thus attempted to be restrained is of such a character that any restraint upon it, however partial, must be regarded by the court as prejudicial to the public interest."

In *Chicago Gaslight & Coke Co. v. People's Gaslight & Coke Co.*, 121 Ill. 530, 13 N. E. Rep. 169, it is declared that—"The ordinary rule that contracts in partial restraint of trade are not invalid does not apply to corporations like appellant and appellee, because they were engaged in a public business, and in furnishing

that which was a matter of public concern to all the inhabitants of the city."

It is not necessary to extend the citation of authorities upon this general proposition, but it is of vital importance to bear in mind the distinction that exists in this particular between private individuals or corporations engaged in ordinary business avocations and public corporations engaged in the performance of a public or governmental duty, like that of building and operating a public highway in the form of a railway line.

From the earliest days the duty of constructing and maintaining the public roads of a country has been recognized as one incumbent upon the government. To secure the construction of a railway running over the property of many individuals, the right of eminent domain must be called into exercise, and thus the character of a public enterprise is impressed upon it both by reason of the purpose it is intended to subserve and by reason of the governmental power exercised in its creation and maintenance. So, also, corporations created for the purpose of building and operating public highways in the form of railroads are of necessity public, not private, corporations, because they are formed for the purpose of engaging in the public work of constructing and operating a highway for the use of the people at large, and because they are authorized to call into exercise the governmental right of eminent domain, a right which cannot be lawfully conferred upon a private corporation engaged solely in enterprises private in their nature. The failure to recognize the distinction existing between private enterprises carried on by individuals or private corporations, and public duties performed through the agency of public corporations, in my judgment has misled the court in reaching the conclusion announced in the majority opinion.

As applied to private associations, the modern authorities undoubtedly sustain the proposition laid down, "that it is not the existence of the restriction of competition, but the reasonableness of that restriction, that is the test of the validity of contracts that are claimed to be in restraint of trade;" but that, in my judgment, is not the test of validity when the action of public corporations relative to public duties is brought in question.

Parties engaged in the manufacture or sale of lumber, dry goods,

or other like articles primarily owe no duty to the public in connection therewith. They may limit or enlarge, continue or discontinue the business, as they please, and may charge exorbitant prices or the contrary. In these particulars they owe no special duty to the public, for they are not exercising any sovereign or public powers in carrying on such private enterprises, nor are they charged with the performance of a public duty. Hence they are at liberty to enter into contracts with other private parties engaged in like pursuits which may tend to regulate or restrict the business carried on by them, subject, however, to the rule that restrictions unreasonably affecting the freedom of trade and commerce, cannot be sustained, because thereby the public interests are affected. Touching contracts between private parties in regard to pursuits essentially private in their nature, the test of validity we thus find to be the actual effect thereof on the public welfare. In regard to such private enterprises the public has no voice in the management thereof, nor any right of dictating what shall or shall not be done by the owners thereof, nor have the latter become bound to carry on the business in the interest or for the benefit of the public primarily. The contrary is true with regard to public corporations, clothed with the power to fulfill public duties, and engaged in enterprises the purpose of which is to discharge a governmental duty, and which require in their performance the exercise of the sovereign right of eminent domain.

Such public corporations owe primarily a duty to the community and the relations existing between them and the public are in many particulars radically different from those pertaining to private corporations. Neither extended argument nor the citation of authorities is needed to show that the business of railway transportation is one of a public character, and which reaches and affects the business interests of the entire community. When a highway in the form of a railroad is constructed and put in operation, all parties living in the regions adjacent thereto are dependent upon the railroad for the carrying on of all business which involves the transportation of persons or property in connection therewith. The farmer is compelled to use the railway for the transportation of the products of his farm to market. The merchant must use the same agency in bringing to his place of business the merchandise in

articles of prime necessity to the people? Do they not food products of the country, the fuel, and all the other necessities of life? Do not the rates charged for the transportation of these articles have as much to do with determining the rates paid by the community as the rates charged by those buying and selling the same upon the open market? Do combinations among the dealers in such articles to avoid competition and enhance the cost to the consumer are illegal and are not combinations among common carriers engaged in the transportation of the same articles, tending to enhance the cost to the consumer by avoiding the effect of competition upon the rates of transportation, equally void?

If I correctly understand the opinion of the majority, it is admitted that it is the settled law that contracts or combinations between producers or dealers in staple commodities of prime necessity to the people, tending to monopolize the supply or to fix the price, are contrary to public policy and therefore void; and it is maintained that public corporations like railroad companies combine to fix the rates to be charged for the transportation of staple commodities, which of necessity affects the cost to the consumer, as well as the value to the producer, and that contracts arbitrarily establishing the rates to be charged, and avoiding the effect of competition thereon, cannot be held to be invalid. It can be clearly shown that the rates thus fixed are unreasonable. It seems to me the two propositions are clearly at variance.

The right to freely contract and combine possessed by private parties engaged in private pursuits is limited and denied when they come to deal with staple commodities, because the whole community is interested in these articles of prime necessity, and any combination affecting them affects the public; and clearly public corporations are under a stringent rule in this particular.

Unlike private parties engaged in private pursuits, which incidentally, if at all, affect the public welfare, corporations created for the purpose of constructing and operating the modern public highways owe primarily a duty to the public. They are created to subserve a public purpose, to wit, to furnish the means for the transportation of the people and property of the country, and they are under constant obligation to use their corporate

in the interest of and for the benefit of the community from which these powers have been derived.

The right to demand transportation for one's self or property over such highways belongs to every member of the community, and the rate to be paid for such service is a question which affects every one using the highway, and, in addition, every member of the community is affected by the rates charged, for the amount thereof enters into and affects the price of every article that is bought and sold in the community. The duty of transporting persons and property over a line of railway is a public duty, assumed by the corporation operating the particular line, and in the proper performance thereof the public has a direct interest. The proper performance of this duty includes the rate of compensation to be charged for the services rendered, and this is a question in which the public has a direct and most important interest, and all contracts and combinations intended to affect the rate to be charged directly affect the public welfare. Clearly, therefore, railway transportation of persons and property comes within the classes of business, which, in the language of the supreme court in *Gibbs v. Gas Co.*, *supra*, are of such a public character that presumably they cannot be restrained to any extent whatever without prejudice to the public interest.

In the opinion of the majority it is practically assumed that the same freedom to contract or combine with others is possessed by the public corporations engaged in railway transportation as belongs to private parties engaged in private pursuits. It does not so seem to me, either upon principle or authority. Private corporations are not created for the primary purpose of furthering the public interests, nor do they assume the performance of a public duty. Conducting private enterprises for private gain, there is no presumption that their acts will affect the public welfare, and hence their freedom of contract and action is not to be limited or denied, unless it clearly appears that the interests of the community will be injuriously affected by the action proposed to be taken. On the other hand, in the case of public corporations engaged in carrying on a public enterprise, it is apparent that every course of action intended to affect the business transacted by the corporation must of necessity affect the public interests.

A railway corporation engaged in the transportation of the per-

sons and property of the community is always carrying on a public business, which at all times directly affects the public welfare. All contracts or combinations entered into between railway corporations, intended to regulate the rates to be charged the public for the service rendered, must of necessity affect the public interests. By reason of this marked distinction existing between enterprises, inherently public in their character and those of a private nature, and further by reason of the difference between private persons and corporations engaged in private pursuits, who owe no direct or primary duty to the public, and public corporations created for the express purpose of carrying on public enterprises, and which, in consideration of the public powers exercised in their behalf, are under obligation to carry on the work intrusted to their management primarily in the interest and for the benefit of the community, it seems clear to me that the same test is not applicable to both classes of business and corporations in determining the validity of contracts and combinations entered into by those engaged therein.

In the case of railway companies engaged in the public business of transporting persons and property from state to state over the highways of the country, it is in my judgment, clearly contrary to the public welfare, and therefore illegal for these public corporations to enter into contracts and combinations intended to limit or nullify the effect of free and unrestrained competition upon the rates to be charged the public for the services rendered in the transportation of persons or property over the public highway. So far as the national government has dealt with this question, it has as yet not undertaken to declare by statute what rates shall be charged by the railway companies, nor has it established a fixed maximum or minimum limit. In this particular the public has relied upon the effect of competition in keeping the rates charged within reasonable bounds. Hence it is that all sections of the country have so eagerly striven to secure the construction of competing lines of railway. There is scarcely a town or city in the community that has not felt the need of securing access to rival lines of transportation, in order that it might enjoy the benefits of competition in reducing the freight and passenger tariffs of the railway companies. If, after a community has by donations or taxation expended a large sum in securing the construction of a second line of railway for the purpose of thereby enjoying the benefits of competition, it is open to

the two railway corporations to combine together, and by contract establish a tariff of rates which neither company is at liberty to depart from, it is clear that the community is thereby deprived of its only protection against unfair charges.

In my judgment, the community is absolutely entitled to the protection against unfair rates which is afforded by free and unrestrained competition between the companies engaged in the transportation business in the country, and any contract or combination which is intended to restrict competition in this particular is inimical to the public welfare, and is therefore illegal.

In the opinion of the majority of the court it is urged, in substance, that it is lawful to place a reasonable restriction upon competition, and that, therefore, the question in each case is whether the restriction placed upon competition results in the imposition of unreasonable rates in the services rendered. This is the rule in regard to private parties engaged in private pursuits, because as to such pursuits a restriction upon competition does not affect the public unless it is unreasonable, and the public has no right of complaint until its interests are unfavorably affected; but, as I have endeavored to maintain, in the case of public railway corporations, the work they are engaged in is inherently of a public nature, and any contract or combination entered into between them, intended to affect the rates to be charged, must of necessity affect the entire community. In view of the public interest in the rates charged for transportation over the public highway, and in the absence of legislation affording other means of protection, the community cannot be deprived of the safeguard secured by free and unrestricted competition between the different lines of railway without placing the welfare of the public in subjection to the interests or supposed interests of those managing these corporations, which certainly cannot be lawfully done.

But it may be argued that due protection in this particular is afforded by holding that reasonable restriction upon competition as to rates will be sustained, and unreasonable restrictions will be held invalid. I apprehend that no other meaning can be given to this proposition than that, if the rates established under a given restriction upon competition are reasonable, then they will be sustained; otherwise not. The reasonable rates which the community is entitled to enjoy are those which result from free and unrestrained

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it would not do to accept as a standard rates fixed by a combination, for it could not be known that these rates are reasonable, and the proposed standard would be without value as evidence. The difficulties that would of necessity be encountered by any citizen in establishing the unreasonableness of a particular rate charged him are such as to render a remedy by that method of no value and hence it is that at all times the citizen is entitled to the protection afforded him by absolutely free competition between railway companies. Any contract or combination which tends to deprive the citizen of the protection thus afforded him is contrary to public policy.

In the opinion of the majority a very full and careful analysis is made of the various provisions of the contract entered into by the defendant companies, and the benefits to be derived therefrom are pointed out. I do not doubt that in many respects the provisions of this contract, if carried out, would operate beneficially for the companies and without injury to the public; but the illegality of the contract, in my judgment, lies in the fact, that its main purpose is to protect the companies from the effects of free competition in reducing the rates to be collected for the transportation of freight over the lines of railway operated by the contracting corporations. Certainly the defendants, if they considered themselves bound by this agreement, were no longer at liberty to compete with each other in the matter of rates to be charged the public.

The rates are to be established by a committee, and are to be observed by all the contracting parties, with a liability to a penalty for any breach of the contract. It is clearly evident that the defendants entered into this contract in the expectation that thereby a schedule of rates would be fixed which would differ from those which would prevail in the absence of such concerted action.

The several companies are no longer left free to fix rates based upon considerations pertaining to their own lines of railway, the cost of operating the same, and the facilities possessed for handling the business. If the making and enforcement of this contract would not have the effect of establishing a schedule of rates other and different from what would obtain in the absence of the contract, what induced the companies to enter into it? I can place no other construction upon this contract than that its main object

was to remove the question of rates from the field of competition. In my judgment it is not necessary to enter upon a minute examination of the averments made in the bill and denied or admitted in the answer. The bill charges and the answer admit that the defendant companies entered into the contract in question. The main issue in controversy is as to the validity of the contract. As I construe it, the invalidity thereof is apparent on its face, in that it clearly appears that the purpose of the contract was to establish by agreement a schedule of rates which would bind all the contracting companies, and which each company would be bound to enforce as against its patrons; thus depriving of the protection resulting from free and unrestrained competition between these public corporations. It matters not that the particular rates now enforced under this contract may be reasonable. That is not the question. The point to be decided is whether these public corporations, engaged in a public enterprise, have the right to agree that they will cease to compete with each other.

Whether these corporations shall or shall not be relieved of the effects of free and fair competition in the carrying on of public work they are engaged in is a question to be decided by the people, acting through the proper governmental agency. It is not for the railway companies to decide when they will compete with each other and when they will not. The public welfare demands that they should remain always subject to the operation of this principle of free competition, unless they are freed therefrom by legislative action, whereby other safeguards are substituted that afforded the public by the operation of the principle of free competition.

If I correctly apprehend that portion of the majority opinion which deals with the effect of the interstate commerce act, it is therein argued that this act radically changes the rights of the railway companies and the public in this particular, and that it was intended thereby to free the companies from the effects of free competition. With all due deference to my brethren, I cannot be permitted to say that it seems to me that the opinion loses sight of the distinction existing at the common law between private parties following private pursuits and public corporations engaged in public enterprises.

The interstate commerce act did not materially change the rights pertaining to the public. It created certain machinery for the better enforcement and protection of the public interests, but the rights to be protected were already in existence, and the statute in this respect is only declaratory of common law principles. Before the enactment of that statute, railway companies were recognized to be public corporations, charged with the duties and obligations pertaining thereto. As common carriers they were under legal obligations to deal with the public, and to afford equal facilities to every citizen, and they were only entitled to demand reasonable, and not exorbitant compensation for the services rendered by them. The purpose of the interstate commerce act was not so much to change the legal rights of the common carriers and of the public as it was to compel a change in the practices of the railroad companies, and to enforce compliance on their part with the duties and obligations which rested upon them under the principles of the common law. The line of argument followed by the majority seems to assume that the main purpose of the interstate commerce act is to regulate the relations between the competing lines of railway, and to protect the weaker lines of railway and the capital invested therein from being absorbed by the stronger competitor. That there are evils of this nature of great magnitude is not to be denied, but the interstate commerce act was not enacted for their eradication.

The primary purpose of that act was to deal with the relations existing between the common carriers and the public, and to enforce the rights of the latter. Experience had shown that railway companies had, in many instances, favored particular localities or particular parties or particular classes of business at the expense of the community at large, and the act was, in the language used by the supreme court in *Railway Co. v. Goodridge*, 149 U. S. 680; 13 Sup. Ct. Rep. 970, intended "to cut up by the roots the entire system of rebates and discriminations in favor of particular localities, special enterprises, or favored corporations, and to put all shippers on an absolute equality." The uniformity and equality of rates sought to be secured by that act are not between the schedules of rates showed by the several companies but between

transportation of the products of the country. Competition, free and unrestricted, is the general rule which governs all the ordinary business pursuits and transactions of life. Evils, as well as benefits, result therefrom. In the fierce heat of competition the stronger competitor may crush out the weaker. Fluctuations in prices may be caused that result in wreck and disaster, yet, balancing the benefits as against the evils, the law of competition remains as a controlling element in the business world. That free and unrestricted competition in the matter of railroad charges may be productive of evils does not militate against the fact that such is the law now governing the subject. No law can be enacted nor system be devised for the control of human affairs that in its en-

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reasonableness and consequent legality. I cannot believe that such is the meaning of the interstate commerce and the anti-trust acts. When the latter act was adopted, it had been declared by the supreme court of the United States to be the law that, with regard to the classes of business that are of a public nature, and are carried on to meet a public necessity, contracts imposing restraints thereon, however partial, cannot be sustained, because in contravention of public policy. It cannot be successfully questioned that railway companies engaged in interstate trade and commerce are carrying on a business of such a public character as of necessity places it in the class declared by the supreme court to be of such a nature that no restraint thereof, however partial, is permissible. It is a familiar principle that statutes are to be construed with reference to and in the light of the law existing at the date of their enactment. Thus reading the anti-trust act is not the first section thereof intended to clearly enunciate in statutory form the principle already declared to be the law by the supreme court? The interstate commerce and anti-trust acts were passed for the protection of the interests and enforcement of the rights of the public. The view taken thereof in the opinion of the court results in curtailing the rights of the public and in enlarging the powers of railway companies. If the law be as is therein declared then these public corporations, engaged in carrying on the public duty of constructing and operating the public highways, over which, of necessity, nearly the entire traffic of the country must be carried, are at liberty to combine together and determine in secret conclave the rates they will demand from the public for the services rendered, and enforce the imposition of the schedules thus fixed by penalties assessed against any party to the combination which may vary from the agreed schedule, and the individual citizen has no relief against rates thus fixed, unless he can satisfy some court or jury that the rate charged is unreasonable.

It is admitted in the opinion of the court that the contract in question has some tendency to check competition in rates, but it is said the restraint is slight, and therefore lawful. If the natural tendency is to check competition in the matter of rates, and to place a restraint, though but slight, upon the freedom of interstate traffic, what tribunal is to determine when the proper boundary


has been passed, and by what standard is the lawfulness of the restraint to be measured? The legal consequence of the position of the court is that railway companies, by combinations between themselves, may fix the schedule of rates to be charged the public, and may bind themselves under penalties not to depart from the rates thus agreed upon, and the citizen is bound to pay the tariff thus established, unless he can satisfy a court that the sum charged is unreasonable. It may sound well to say that the courts are open to the citizen, and that they will afford him protection against the action of unreasonable rates, but we know that the supposed remedy would only aggravate the original wrong. It is said in the opinion of the court that there is nothing in the contract described in the bill which indicates any purpose or attempt to obtain a monopoly of the trade of the region traversed by the defendant corporations; that the systems of the Great Northern, the Northern Pacific, the Southern Pacific, and Texas Pacific Railway Companies are operated in the region subject to the regulations of the defendant association, but they are not members of it, and therefore the defendant companies cannot monopolize the entire traffic of the region. The great majority of the patrons of the several lines of railway represented in the association in question do not live at competitive points. As to each of them the line of railway nearest to them has, of necessity, an absolute monopoly of the carrying trade belonging to the business in which they are engaged. Of what advantage to a farmer, a merchant, or a manufacturer doing business at or adjacent to a station upon a given line of railway is the fact that twenty or fifty or 500 miles from his place of business there is another railway line? The distance is so great, and the cost of reaching the same is so great, that he is practically debarred from making use of the same, and he has no choice in the matter. Parties doing business at competitive points may have free choice, and as to them it may be true that neither competing line has a monopoly of the business transacted at places where competition, being free and unrestricted may work out its legitimate results, but this is not true of persons engaged in business at noncompetitive points. As to them, the control of the railway company adjacent to them is practically absolute. Of necessity, in such case the railway company has a complete monopoly of the entire transportation traffic of the region in which there is in fact

no competing line. Against the evil tendencies of this monopoly, protection is afforded to the citizen by securing free and unrestrained competition between the lines of railway at the several points or localities where they in fact come into active competition, and, reasonable rates having thus been secured at these points, we have a standard established by which it may be determined whether the rates charged from intermediate non-competitive points are reasonable or not, and the provisions of the interstate commerce act forbidding a greater charge for a shorter than a longer haul under similar circumstances may be invoked to secure a proper proportionate relation between the rates at competitive and non-competitive points. If, however, the railway companies may combine together to fix the rates to be charged at competitive points, thus eliminating the effect of free competition, how fares it with the citizen residing at the non-competitive point? by the very necessities of his location he is debarred from choosing the line of railway he will patronize. He is compelled to avail himself of the facilities afforded by the line nearest him. The railway, therefor, has the absolute monopoly of the transportation pertaining to the business of the citizen. It likewise has exclusive control of the rates to be charged; and if the company, by contracts and combinations with the other lines of railway operating in the same region, may free itself from the restrictions afforded by free competition, what is lacking to constitute a complete and absolute monopoly of the transportation business thus dependent upon the given line of railway? The direct and necessary consequence of the contract entered into by the defendant companies is to create and perfect an absolute monopoly in each of the contracting parties over that part of the business carried over their respective lines which comes from that portion of the territory in which there is not in active operation a competing line; and, even as to regions which are so situated that competition might be had in the absence of contracts preventing the effects thereof, a like monopoly is created by the contract entered into by the defendant companies.

In the matter of rates, competitive points are those where the transportation business of the locality is sought by two or more competing lines. In the case of sales of property at public auction, it is the rule that combinations among proposed purchasers,

that traffic which, in the absence of combinations between the railway companies, would be controlled by the results of competition, and to deal with it in such manner that it will cease to be competitive traffic and become the subject of combinations and agreements whereby the rates to be charged—which is the essential element in which the public has a vital interest—is removed from the protection derivable from free and unrestrained competition, and is left to the determination of committees appointed by the railway companies, whose action is binding upon the members of the association, and against which the individual citizen is without adequate remedy, no matter how unjust the rate fixed by the committee in fact may be?

Another feature observable on the face of this contract is that by the exceptions contained in article I the traffic between many points and in some classes of freight are excepted out from the operation of the agreement, and thus it appears that it is the express purpose of the defendant companies to carry on part of their business subject to the results flowing from combinations between the carriers, and other portions are not to be affected thereby. Is it not the natural result that the public will be subjected to different burdens, and that differences in rates will be charged, which in effect will result in discriminations for or against particular localities? But I shall not dwell upon this and other points of minor importance. As I view the subject, the inherent and fatal vice existing in the combination and agreement entered into between the defendant railway companies is found in the fact, patent upon the face of the contract, that it is the main purpose of the contracting parties to stifle competition in the matter of rates to be charged the public. The illegality of such purpose is not dependent upon the extent of the restraint placed upon the freedom of the public business, but upon the fact that the avowed intent is to place a restraint, whether slight or great, upon a class of business which is inherently and always of a public nature, and touching which the declaration of the law, both common and statutory, is that it must remain wholly free and unrestricted. If the protection afforded by fair and free competition can be evaded and nullified by means of combinations such as are contemplated and provided for in the contract entered into by the defendants in this case, then the only safeguard against unreason-



able rates will be stricken down, and thus interstate commerce will be subjected to the restraints and injuries flowing from the imposition of tariff rates agreed upon by the companies, but in the establishment of which the public has no direct control through legislation, nor direct influence through the effect of free competition.

In my judgment, the right to insist upon free competition between railway companies engaged in carrying on interstate commerce is a right which belongs to the public of which, it cannot be deprived except by its own consent, and every contract or combination between these public corporations which tends to

I think not." *United States v. Trans. Missouri Freight Association*, 58 Fed. Rep. 440. On the subject of such contracts between railroads see *Manchester etc., R. R. Co. v. Concord R. R. Co.*, 3 Am. R. R. & Corp. Rep. 22 and note. On the subject of contracts and combinations in restraint of trade generally, see the two preceding cases and the next two cases and notes thereto.

PEOPLE v. SHELDON et al.

(Court of Appeals of New York, Oct. 8, 1898.)

1. **TRADE COMBINATIONS. ASSOCIATION OF RETAIL COAL DEALERS TO FIX PRICES. VALIDITY.** An association formed by the retail coal dealers of a city for the purpose of controlling the price of coal, and managing the business of the sale of coal, so as to prevent competition in price between members, is an act "injurious to trade and commerce" and illegal, irrespective of whether the prices fixed are reasonable or otherwise.

2. **CONSPIRACY. OVERT ACT.** The entering into the agreement of association constituted a conspiracy to commit an act "injurious to trade or commerce" and the raising of the price of coal by the association constituted an overt act in pursuance of the conspiracy, sufficient to sustain a conviction for conspiracy under the penal code, whether the price fixed was unreasonable or injurious to the public interests or not.

A PPEAL from the affirmance by the general term, fifth department of judgment of conviction in the Niagara county sessions on indictment for conspiracy. The indictment set forth an agreement between the defendants and others, comprising all the retail coal dealers in the city of Lockport except one, entered into in March 1892, to organize the Lockport Coal Exchange, which agreement was as follows:

"Constitution and By-Laws.

"Name. The name of this exchange shall be the Lockport Coal Exchange.

"Objects. The objects of this exchange shall be to foster trade and commerce in coal, wood, and all the products appertaining to the same; to protect and secure freedom from unjust and unlawful exactions; to diffuse accurate and reliable information as to the retail coal trade, and of the responsibility and standing of customers, and other matters, among its members, for their mutual protection and benefit; to settle differences between its members; to produce uniformity and certainty in the customs and usages of such trade; to promote a more enlarged and friendly intercourse between merchants and dealers in coal and wood; and to provide,

establish, and maintain such rules and regulations as may be proper and necessary for the mutual co-operation, interest and protection of the retail dealers in coal and wood in the city of Lockport, and in furthering the coal trade interests generally. It shall be the duty of all members to strictly obey all the provisions of the constitution, by-laws and resolutions of the exchange, and permit to the secretary the free exercise of the duties imposed upon him in enforcing them.

"Officers. The officers of the exchange shall be a president and a vice-president; who shall be elected by the exchange, and who shall be members of the exchange, and also a secretary and treasurer, elected by the exchange. The officers shall hold office for the term of one year, and until their successors are elected and shall have duly qualified; and any officer may be removed from office by the five-sixths vote of all the members of the exchange, at any regular or special meeting thereof.

"Committees. There shall be such committees as the president or the board of trustees may from time to time designate.

"President and Vice President. The president shall preside at all meetings of the exchange, or, in his absence, the vice-president.

In the absence of the president and vice-president, a presiding officer shall be chosen from the members of the exchange. The president shall be, ex officio, a member of all committees.

"Secretary. The secretary shall not be a member of the exchange, nor in any manner personally interested in the coal trade. He shall be elected by at least a five-sixths vote of all the members of the exchange at a regular or special meeting, due notice of said intended election having been sent by mail to each member, at his regular business address, at least five days previous to the meeting. The secretary shall keep a record of the meetings of the exchange a register, of its members, officers, and committees and conduct all correspondence of the exchange, and perform such other duties in connection with his office as may be imposed upon him by the exchange. He shall instantly investigate all charges preferred against the members of the exchange, on all well founded suspicions, without fear or favor, and conduct the investigation, both to obtain proof, and when presented before the exchange, and shall render his decision in each case to the exchange within ten days from the date on which charges are made, unless further

time is given him by the exchange. He shall be permitted to see any portion of the books of any member, when in pursuit of evidence of wrong doing, and may demand an affidavit, when he thinks necessary to refute or sustain a specific charge. He shall also collect material for and compile, a list of persons who are poor pay, for the mutual protection and benefit of the members of the exchange. He shall also be the keeper of the seal of the exchange, and receive such salary as may be determined upon by the exchange. Before the secretary shall enter upon the duties of his office, he shall make oath that he will honestly and fearlessly perform the duties prescribed by the constitution and by-laws, and that he will keep, in honor and secrecy, any and all information by him acquired, regarding the business of the various members, as he from time to time may investigate them, except any facts connected with any violation of the laws of the exchange which the exchange or any member is entitled to know. If practicable, the secretary shall be a notary public. The secretary shall not disclose to any member of the exchange any information regarding any investigation, while he is making the same.

"Treasurer. The treasurer, who shall also be the secretary, shall have charge of the funds of the exchange, disburse the same on the order of the board of trustees, countersigned by the president, and shall report at all regular meetings, and his accounts shall be open for proper inspection at all proper times. He shall give bonds for the proper protection of the exchange.

"Membership. The exchange shall be composed of active and associate members. Active members shall comprise any retail coal dealer, firm, or company who has a yard or dock, and the usual appliances for doing a coal business, in the city of Lockport. Associate members shall comprise any individual, company, or firm that sells coal in the villages around Lockport, and who approves the objects of, and agrees to co-operate with, the exchange. Associate members shall pay an annual fee of five dollars, and shall have all the privileges of active members, except the right of voting.

"Discipline. If a member is charged with violating any provision of these by-laws, or any rule or resolution of the exchange, or of being guilty of conduct unbecoming a member, or prejudicial to its interests, or of giving short weight or overweight, he

shall be summoned before the secretary to answer the charge. If, upon the charge and defense being heard by the secretary, he shall decide to sustain the charge, the member shall be declared

and persistent, and for this reason is not entitled to the privileges of membership in the Lockport exchange.

"Election of Members. A candidate for membership shall be proposed in writing by a member at a regular meeting of the exchange, and be recommended by two members in good standing, and at the next succeeding regular meeting be voted upon. A two-thirds vote of the members of the exchange shall be requisite to elect.

"Price of Anthracite Coal. The price of coal at retail, shall as far as practicable, be kept uniform, and it shall require a five-sixths vote of all members of the exchange, at any meeting to advance or reduce the retail price of coal, and no price shall be made at anytime which amounts to more than a fair and reasonable advance over wholesale rates, or that is higher than the current prices of the exchanges at Rochester or Buffalo, when figured upon corresponding freight tariff; but at no time shall the price of coal at retail exceed one dollar above the cost of the same at wholesale, except by the unanimous vote of all the members of the exchange. All votes upon the price of coal shall be *viva voce*. The sale of coal shall be through the nominal channels of the trade. Soliciting shall be discouraged, and no club orders of associated buyers, to reduce prices, shall be considered or accepted. No member shall employ any person temporarily to solicit orders, either on salary or on commission, and no signs indicating, 'Orders taken for coal,' shall be displayed at groceries or other 'outside places,' and no habitual orders for second parties shall be received or filled when sent in by such agencies, whether on commission or other form of reciprocity, or only as a matter of friendship. Except that each member shall have one place for taking orders, in addition to his regular yard office.

"Meetings. The annual meeting of the exchange shall be held on the first Monday of April of each year. The regular meeting shall be held on the first Monday of each month. Special meetings may be called by the president, or upon the written request of three members, which request shall be sent to the secretary, stating the object of such meeting; and the notices of any special meeting shall state the object of the same, and no other business shall be transacted at such meeting. At all meetings of the ex-

exchange at a regular meeting, provided that notice of such proposed amendment shall have been presented in writing at a previous regular meeting.

"We, the undersigned, agree to abide by the above constitution and by-laws of the Lockport Coal Exchange. James Lennon & Son. Angevine & Hoover. P. H. Tuohy. Charles Whitmore & Co. J. Marc. Fowler. Sheldon N. Cook. Upson & Stevens. E. S. Brown. M. W. Carr. Ferrin Bros. Co., Inc. M. McManus. Edward B. Jelly."

The indictment, among other things, alleged that the agreement constituted an unlawful conspiracy to raise, increase, and augment the rates and prices of coal, at retail, in the city of Lockport, and to destroy free competition among the signers of the agreement and others, in the sale of coal in said city, and to compel the consumers of coal to pay therefor the prices fixed by the coal exchange. It alleged that, in pursuance of said conspiracy, the defendants and others, members of said exchange, organized the same, elected officers, and by resolution did "fix, determine, and establish the rate and price of anthracite coal at retail, in said city, at four dollars and seventy-five cents per ton for egg, chestnut, stove, and grate coal, and three dollars and seventy-five cents per ton for pea coal, and other higher rates for small quantities of the same; said rates and prices so fixed, determined, and established being over seventy five cents per ton higher and in advance of the then market price of such coal at retail in said city." The indictment alleged an unlawful intent, and concluded by an averment that the "conspiracy as aforesaid, so carried into execution as aforesaid, is of grievous injury to trade and commerce, prejudicial to the public good and welfare, against the form of the statute," etc. The proof established the execution of the agreement as alleged; the organization of the exchange by the election of officers; the fixing of the price of coal at an advance beyond the then market price, which price was thereafter charged therefor; the notification of the wholesale dealers, by the secretary, of the organization of the exchange, with the names of the members. Other facts are set forth in the opinion.

E. M. Ashley for appellants. *P. F. King*, Dist. Atty., for the people.

ANDREWS, C. J.—Section 168 of the Penal Code makes it a misdemeanor for two or more persons to conspire (subd. 6) “to commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of public justice, or of the due administration of the laws.” The Revised Statutes contained a similar provision. 2 Rev. St. p. 692, § 8, subd. 6. The fact that the defendant subscribed to the constitution and by-laws of the Lockport Coal Exchange, and participated in its management, was not controverted on the trial. Nor was there any dispute that the object of the organization was to prevent competition in the price of coal among the retail dealers, acting as the Lockport Coal Exchange, by constituting the exchange the sole authority to fix the price which should be charged by the members, individually, for coal sold by them. Nor is there any dispute that, in pursuance of the plan, the exchange did proceed to fix the price of coal, and that the parties to the agreement were thereafter governed thereby in making sales to their customers. Nor is it questioned that the price first established was 75 cents in advance of the then market price, and that there was afterwards a still further advance. The defendants gave evidence tending to show (and of this there was no contradiction) that before and at the time of the organization of the exchange the excessive competition between the dealers in coal in Lockport had reduced the price below the actual cost of the coal and the expense of handling and that the business was carried on at a loss. It was not shown that the prices of coal, fixed from time to time by the exchange, were excessive or oppressive, or were more than sufficient to afford a fair remuneration to the dealers. The trial judge submitted the case to the jury upon the proposition that if the defendants entered into the organization agreement for the purpose of controlling the price of coal, and managing the business of the sale of coal, so as to prevent competition in price between the members of the exchange, the agreement was illegal, and that if the jury found that this was their intent, and that the price of coal was raised in pursuance of the agreement to effect its object, the crime of conspiracy was established. The correctness of this proposition is the main question in the case.

If the confederacy into which the defendants entered was an act “injurious to trade or commerce,” irrespective of its results

in the particular case, then there is no difficulty in maintaining the conviction. If a combination between independent dealers to prevent competition between themselves in the sale of an article of prime necessity, is, in the contemplation of the law, an act inimical to trade or commerce, whatever may be done under and in pursuance of it, and although the object of the combination is merely the due protection of the parties to it against ruinous rivalry, and no attempt is made to charge undue or excessive prices, then the indictment was sustained by proof. On the other hand, if the validity and legality of an agreement having for its object the prevention of competition between dealers in the same commodity depend upon what may be done under the agreement, and it is to be adjudged valid or invalid according to the fact whether it is made the means for raising the price of a commodity beyond its normal and reasonable value, then it would be difficult to sustain this conviction, for it affirmatively appears that the price fixed for coal by the exchange did not exceed what would afford a reasonable profit to the dealers. It was said by Parker, C. J., (Lord Macclesfield) in his celebrated judgment in *Mitchel v. Reynolds*, 1 P. Wms. 181, which was the case of a bond taken from the defendant on the sale by him to the plaintiff of the lease of a bake house, claimed to be void as in restraint of trade: "In all restraints of trade, where nothing more appears, the law presumes them bad. But if the circumstances are set forth that presumption is excluded, and the court is to judge of these circumstances, and to determine accordingly; and if, upon them, it appears to be a just and honest contract, it ought to be maintained." If this agreement, and what was done under it, is to be judged as an isolated transaction, and its rightfulness is to be determined alone upon the particular circumstances, whether it did or did not produce an injury to trade, we might well hesitate. The obtaining by dealers of a fair and reasonable price for what they sell does not seem to contravene public policy, or to work an injury to individuals. On the contrary, the general interests are promoted by activity in trade, which cannot permanently exist without reasonable encouragement to those engaged in it. Producers, consumers, and laborers are alike benefitted by healthful conditions of business. But the question here does not turn on the point whether the agreement between the retail dealers in coal did,

as matter of fact, result in injury to the public, or to the community in Lockport. The question is, was the agreement one, in view of what might have been done under it, and the fact that it was an agreement, the effect of which was to prevent competition among the coal dealers, upon which the law fixes the brand of condemnation, and which it will not permit? It has hitherto been an accepted maxim in political economy that "competition is the life of trade." The courts have acted upon and adopted this maxim in passing upon the validity of agreements, the design of which was to prevent competition in trade, and have held such agreements to be invalid. It is to be noticed that the organization of the "exchange" was of the most formal character. The articles bound all who became members to conform to the regulations. The observance of such regulations by the members was enforced by penalties and forfeitures. A member accused by the secretary of having violated any provision of the constitution or by-laws was required to purge himself by affidavit, although evidence to sustain the charge should be lacking. The shippers of coal were to be notified, in case of persistent default by the member, that "he is not entitled to the privileges of membership in the exchange." No member was permitted to sell coal at less than the price fixed by the exchange. The organization was a carefully-devised scheme to prevent competition in the price of coal among the retail dealers, and the moral and material power of the combination afforded a reasonable guaranty that others would not engage in the business in Lockport except in conformity with the rules of the exchange. The cases of *Hooker v. Vandewater*, 4 Denio, 349, and *Stanton v. Allen*, 5 Denio, 434, are, we think, decisive authorities in support of the judgment in this case. They were cases of combinations between transportation lines on the canals to maintain rates for the carriage of goods and passengers, and the court in those cases, held that the agreements were void, on the ground that they were agreements to prevent competition; and the doctrine was affirmed that agreements having that purpose made between independent lines of transportation, were, in law, agreements injurious to trade. In those cases it was not shown that the rates fixed were excessive. In the case in 5 Denio, the judge delivering the opinion referred to the effect of the agreement upon the public revenue from the canals. This was an added circumstance, tending to show the

injury which might result from agreements to raise prices or prevent competition. See, also, *People v. Fisher*, 14 Wend. 10; *Arnot v. Coal Co.*, 68 N. Y. 558.

The gravamen of the offense of conspiracy is the combination. Agreements to prevent competition in trade are, in contemplation of law, injurious to trade because they are liable to be injuriously used. The present case may be used as an illustration. The price of coal now fixed by the exchange may be reasonable, in view of the interests both of dealers and consumers, but the organization may not always be guided by the principle of absolute justice. There are some limitations in the constitution of the exchange, but these may be changed and the price of coal may be unreasonably advanced. It is manifest that the exchange is acting in sympathy with the producers and shippers of coal. Some of the shippers were present when the plan of organization was considered, and it was indicated on the trial that the producers had a similar organization between themselves. If agreements and combinations to prevent competition in prices are, or may be, hurtful to trade, the only sure remedy is to prohibit all agreements of that character. If the validity of such an agreement was made to depend upon actual proof of public prejudice or injury, it would be very difficult, in any case, to establish the invalidity, although the moral evidence might be very convincing. We are of opinion that the principle upon which the case was submitted to the jury is sanctioned by the decisions in this state and that the jury were properly instructed that, if the purpose of the agreement was to prevent competition in the price of coal between the retail dealers, it was illegal, and justified the conviction of the defendants.

There is a single remaining question. The trial judge was requested by the defendant's counsel in substance, to charge that the overt act required to be proved to sustain a conviction for conspiracy must be one which might injuriously affect the public, and that the act of the defendants in raising the price of coal was, of itself, not such an overt act as was required. The request was, we think, properly refused. The offense of conspiracy was complete at common law on proof of the unlawful agreement. It was not necessary to allege or prove any overt act in pursuance of the agreement. 3 Chit. Crim. Law, 1142; *O'Connell v. Queen*, 11 Clark & F. 155. In this state this rule of the common law was

change by the Revised Statutes; and, with certain exceptions, it was provided that no agreement should be deemed a conspiracy "unless some act beside such agreement be done to effect the object thereof by one or more of the parties to such agreement." 2 Rev. St. p. 692, § 10. And this principle was re-enacted in the Penal Code, § 171. The object of the statute was to require something more than a mere agreement to constitute a criminal conspiracy. There must be some act in pursuance thereof, and done to effect its object, before the crime was consummated. A mere agreement, followed by no act is insufficient. The overt act charged in the indictment, and proved was the raising of the price of coal. The raising of the price of coal by a dealer unconnected with any conspiracy, is not unlawful; but if there is a conspiracy to regulate the price and that conspiracy is unlawful, then raising the price is an act done to effect its object, whether the price fixed is reasonable or excessive. The object of the statute is accomplished when it is shown that the parties have proceeded to act upon the agreement, and done anything towards effecting its object. We think there is no error in the record, and the conviction should therefore be affirmed.*

All concur.

TRUST, TRADE AND LABOR COMBINATIONS. RECENT DECISIONS.

1. Prior notes and decisions in the series.—All the decisions by courts of last resort upon the legality of trust combinations have been reported in full in these reports as follows: *Richardson v. Buhl*, 1 Am. R. R. & Corp. Rep. 584, (Diamond Match Trust); *People ex rel. v. Chicago Gas Trust Co.*, 1 Am. R. R. & Corp. Rep. 582, (Chicago Gas Trust); *Pittsburgh Carbon Co. v. McMillen*, 1 Am. R. R. & Corp. Rep. 583, (Electric Carbon Trust); *People v. North River Sugar Refining Co.*, 1 Am. R. R. & Corp. Rep. 587, (Sugar Trust); *State v. Nebraska Distilling Co.*, 1 Am. R. R. & Corp. Rep. 604, (Whiskey Trust); *Malloy v. Hansur Oil Works*, 86 Tenn. 598, 1 Am. R. R. & Corp. Rep. 688 note, (Cotton Seed Oil Trust); *State v. Standard Oil Co.*, 5 Am. R. R. & Corp. Rep. 670, (Standard Oil Trust). The subject is treated in note in 1 Am. R. R. & Corp. Rep., p. 620.

On the subject of railroad pools see *Manchester etc. R. Co. v. Concord R. Co.*, 3 Am. R. R. & Corp. Rep. 22 and note; *Cleveland, etc. R. Co. v. Closser*, 8 Am. R. R. & Corp. Rep. 686.

On the subject of trust and trade combinations generally see *Bohn M'fg. Co. v. Hollis*, ante p. 515; *Queen Ins. Co. v. State*, ante p. 491; *United States v. Trans-Missouri Freight Ass.*, ante p. 528.

2. Combination among stenographers to fix prices and prevent

*Reported in 84 N. E. Rep. 785.

competition.—Certain of the stenographers of Chicago formed an association which had for its object, among other things, to fix the prices to be charged for short hand work and to prevent competition or underbidding among its members. The plaintiffs, who were members of the association, had obtained a profitable contract from Cook county, in the reporting of a celebrated murder case, in which they were to receive the rates fixed by the association, but agreed to do the work as low as any other reputable stenographers should offer to do it. During the progress of the trial the defendants, who also belonged to the association, offered to do the work for less than the schedule prices fixed by the association, and so compelled plaintiffs to reduce their price accordingly, in order to retain the work. This was a violation of the rules and regulations of the association on the part of the defendants, and the plaintiffs brought suit to recover the damages they had sustained by such violation. The court held that the suit could not be maintained and sustained a demurrer to the declaration. Passing over any question as to whether membership in the association was sufficient to create a contractual relation between the parties, giving a right of action for a breach of its by-laws and rules, the court places its decision upon the illegality of the association. After referring to some of the authorities which will be found noted in 1 Am. R. R. & Corp. Rep., pp. 626—629, the court says: "The doctrine of the foregoing decisions may, in our opinion, be fairly applied to the facts in the present case. While some of the cases cited involve elements not present here, the determining circumstance in all of them seems to have been a combination or conspiracy among a number of persons, engaged in a particular business, to stifle or prevent competition, and thereby to enhance or diminish prices to a point above or below what they would have been if left to the influence of unrestricted competition. All such combinations are held to be contrary to public policy, and the courts, therefore, will refuse to lend their aid to the enforcement of the contracts by which such combinations are sought to be effected. Counsel seek to distinguish this case from those cited by the circumstance, alleged in the second count of the declaration, that but a small proportion of the law stenographers of Chicago belong to said association. An analogy is sought to be raised between the contract in this case and those contracts in partial restraint of trade, which the law upholds. We think the analogy thus sought to be raised does not exist. Contracts in partial restraint of trade which the law sustains are those which are entered into by the vendor of a business and its good-will with his vendee, by which the vendor agrees not to engage in the same business within a limited territory, and the restraint, to be valid, must be no more extensive than is reasonably necessary for the protection of the vendee in the enjoyment of the business purchased. But in the present case there is no purchase or sale of any business, nor any other analogous circumstance giving to one party a just right to be protected against competition from the other. All of the members of the association are engaged in the same business within the same territory, and the object of the association is purely and simply to silence and stifle all competition as between its members. No equitable reason for such restraint exists; the only reason put forward being that, under the influence of competition as it existed prior to the organization of the association, prices for stenographic work had been reduced too far, and the association was organized for the

purpose of putting an end to all competition, at least as between those who could be induced to become members. True, the restraint is not so far reaching as it would have been if all the stenographers in the city had joined the association, but, so far as it goes, it is of precisely the same character, produces the same results, and is subject to the same legal objection. It may also be observed that, by the constitution of the association, any reputable stenographer, regularly engaged in law reporting in Cook county, is eligible to membership, and, if all or a major part of the stenographers in said county engaged in that business are not already members, it is because the association has not yet fully accomplished the purposes of its organization. We can see no legal difference between the restraint upon competition which it now exercises and that which it will exercise when it is in a position to dictate terms to all who are engaged in the business, and to all who may wish to obtain the services of law stenographic reporters." *More v. Bennett*, 140 Ill. 69; 29 N. E. Rep., 888.

3. Agreement between cotton seed oil mills to control the price of cotton seed and imposing restraints upon the freedom of the

braces within its operation the chief cities or commercial centers of the state, as well as the cotton producing regions thereof, as we may judicially know. *Gulf, C. & S. F. R. Co. v. State*, 72 Tex. 409, 10 S.W. Rep. 481; 1 Whart. Evi. §§ 329, 339. There seems to us to be scarcely anything lacking to characterize the combination between the parties in this case, as evidenced by the language and purpose of their agreement, as a complete monopoly, except the proof, that they were the only parties who were engaged at the specified localities in the manufactures referred to in the contract at the time it was made. It is not improbable that every cotton oil mill in the state was represented in this combination, or was intended to be brought into it eventually; but, as this is not alleged in the petition, we cannot presume it. We must admit some limit even to judicial knowledge. But to render the contract void it is not necessary that it should create a pure monopoly. It would seem that the agreement may be illegal if the natural or necessary consequences of its operation are to prevent competition and create fictitious prices independant of the law of demand and supply, and to such an extent as to injuriously affect the interest of the public, or the interests of any particular class of citizens who may be especially interested, either as producers or consumers, in the articles or staples which are the subject of the restriction imposed by the contract. Likewise, the agreement may be in some instances void because of unreasonable restrictions imposed upon even one of the parties to it. According to the authorities the extent of the restraint, though sometimes difficult to measure, determines the character of the agreement, whether legal or not. *Pike v. Thomas*, 7 Am. Dec. 741 and note. The authorities are too numerous to even cite all of them. From the multitude we shall make a few selections later on, and now we proceed with an examination of the contract.

“It will be seen that the Howard Company was given an almost unrestricted field to obtain the raw material for its mills, and the exclusive right to control free from the competition of the owners of the ‘four mills,’ (who had, no doubt, up to that time, been its rivals,) not only the sales and ruling prices of the products of its own mills, (which are not disturbed in this respect,) but also the entire yield of the mills of the other parties to the contract. It was thus enabled, by the confederation of all the parties, to dictate at will the prices at which the public must buy (if at all) the oils or other products of any of the mills. If both of the parties had entered a market open to both under the contract, in order to purchase the raw materials, they could not have competed, for no competition was contemplated, and all freedom of action in this particular was forestalled by arbitrary regulations of the prices to be paid, which must be observed. In the markets assigned to each they were confronted by the same barrier, and the party cannot buy at all if the market price at that point happens to be greater than the contract price; or, if the price prevailing there should even be below the contract price, still the party could not avail himself of this advantage without first obtaining, if he could, the consent of the other parties. In other words, neither the parties nor the producers of the raw material are to have the benefit of but one price, which has been definitely fixed in advance. These things, as it seems to us, are well calculated to affect the interests of the public detrimentally, and would doubtless have been deemed by the parties as injurious to their own interests had

they been contemplating a lawful enterprise. These restrictions, however, were instituted in this instance not for the purpose of legitimate profits, nor to afford only a fair protection to all of the parties, but as suitable means for preventing all competition. If not, then it would have clearly been to the advantage of the Howard Oil Company, in view of its obligation to the 'four mills,' that the raw materials should be bought by all of the parties to the contract at the lowest prices. This company had bound itself to pay or bear the cost of the seed, as well as the expenses of 'working' the same by the 'four mills,' &c."

After referring to some authorities the court concludes as follows: "We are of the opinion that the contract under consideration, and which was entered into by independent dealers and manufacturers in the same line of business, as already stated, imposed or attempted to impose unreasonable and too extensive restrictions upon trade and the freedom of the parties thereto, and was consequently contrary to public policy and void. We think that its manifest purpose and natural tendency were to prevent competition in too many localities, and to reduce the price of the raw materials upon the one hand as they might choose, and upon the other to enhance that of manufactured products by artificial means, to the disadvantage and detriment of the public." Citing 1 Whart. Cont. § 442, and notes; Callahan v. Donnelly, 45 Cal. 152; Salt Co. v. Guthrie, 35 Ohio St. 666; Sampson v. Shaw, 101 Mass. 145; Wright v. Ryder, 36 Cal. 342, 361; Hooker v. Vandewater, 47 Amer. Dec. 258; Craft v. McConoughy, 79 Ill. 346; Leonard v. People, 114 N. Y. 371; 21 N.E. Rep. 707; Angier v. Webber, 92 Amer. Dec. 741.

4. Agreement among the manufacturers of an article by which one closes his factory in consideration of a percentage on sales by the others. In *Oliver v. Gilmore*, 52 Fed. Rep. 562, it appeared that plaintiffs made a contract with eight firms and corporations, by which the plaintiffs agreed that "the works, factory and machinery owned, leased, and controlled by them, situated in Pittsburgh or elsewhere, shall not be operated or used by any person whatever for the manufacture of strap and T hinges" for a period of five years. In consideration of this agreement, the other parties agreed to pay the plaintiffs three and one-half per cent. upon their net sales of such hinges during the said five years. It was also agreed "that if any one of the parties of the second part should build, buy or place in their works any additional machinery, which will in any way increase their present facilities for the manufacture of strap and T hinges, this agreement shall thenceforth be null and void." One of the parties having failed to pay the percentage agreed upon, the plaintiffs sued to recover it. To a count setting up the contract with other proper allegations the defendant demurred. The court held the contract invalid and sustained the demurrer.

5. Agreement between sheep brokers and butchers to prevent competition and control prices. The sheep brokers of New York and vicinity entered into an agreement by which they formed an association "for the purpose of guarding and protecting their business interests from loss by unreasonable competition," and agreed to pool their commissions and divide them among the members according to an arbitrary percentage fixed by the agreement. For any violation of the agreement by a member he was to pay a per-

alty of \$10,000, which was to be distributed in the same way. An association existed among the butchers of the same place and the two associations made an agreement which was substantially contemporaneous with the former and operated from the same date. This agreement recited that the brokers were engaged in selling, and the butchers in buying, sheep and lambs for slaughter, and that it was for the interest of both that they should be closely connected in business, and should mutually aid and protect each other as thereafter set forth. The brokers bound themselves to keep correct books of account, showing the number of sheep and lambs sold by them on the market, and at the close of every month to render a full and true statement of all such sales to the secretary of the butchers' association, and at the same time pay to said secretary three and one-fourths cents per head for each and every sheep and lamb sold. The brokers further agreed: (1) Not at any time during the term of the agreement to engage in, or be directly or indirectly engaged in, slaughtering sheep or lambs, except for export. (2) Not to sell any sheep or lambs to any one else except the members of the butchers' association, and if they did they were bound to pay the treasurer of the last named association 15 cents per head for the same. Any sales so made were to be reported every week, and payment made on account thereof. The butchers agreed to report to the brokers the names of all members of the association, including new members to be added from time to time; that they would buy sheep and lambs from the brokers only, and, if from any other parties, they would pay over to the brokers, on account thereof, fifteen cents per head, which purchases were to be reported to the brokers every week.

One of the brokers having refused to abide by the agreement, suit was brought to recover from him the agreed penalty. Judgment went against the plaintiff in all the courts. *Judd v. Harrington*, (N. Y.), 84 N. E. Rep. 790; 19 N. Y. Sup. 406.

Referring to the two agreements the court of appeals says: "These two papers must be read together, and, thus considered, they manifestly were intended for the purpose of creating a combination between the butchers engaged in buying, and the brokers engaged in selling, sheep and lambs, in order to control the market, fix the price, and destroy competition. The brokers were to sell only to the butchers and the butchers to buy only from the brokers. The owners of sheep, or the drovers or consignees who had them for sale, and the public who were interested in the price of meat, as an article of food, might have been prejudiced by the agreement. Whether they were, in fact, is not material. The real purpose and intent of the agreement were to suppress competition in an article of food, and, as such agreements tend to enhance the price, they are regarded as detrimental to the public interest, and forbidden by public policy. That such agreements are illegal and void has been settled by the decisions of the courts from the earliest times. * * *

Courts will not aid parties seeking to enforce such an agreement. (*Leonard v. Poole* 114 N. Y. 871, 21 N. E. Rep. 707,) irrespective of the question whether, in fact, it produced the evil results to which it tended, or was harmless. It is said that the purpose was to facilitate the transaction of business, and save useless expense. It is quite likely that the agreement did enable the parties to transact their business with less labor and expense, and that may be

pressly forbidden by law. Its effect was to combine coal producers and carriers, and to partially destroy competition in the production and sale of anthracite coal, a staple commodity of the state. Held to be a corporate excess of power, which tends to monopoly and the public injury, *Ibid.* See also for further proceedings in the case *Stockton, Attorney General, v. Central R. Co.*, (N. J. Ch.), 25 Atl. Rep. 942.

8. Labor combinations. Enjoining boycott and interference with interstate commerce. Toledo, Ann Arbor & North Mich. R. R. litigation. On the 7th of March, 1898, the locomotive engineers of the Toledo, Ann Arbor & North Mich. Railroad went out on a strike. The strike had been approved by P. M. Arthur, chief of the brotherhood of locomotive engineers, an association embracing locomotive engineers in active service in the United States, Mexico and Canada, and having a membership of some 85,000. Soon after the inauguration of the strike, the Toledo company filed a bill against eight connecting railroads, alleging that they had threatened to refuse to receive from and deliver to the complainant interstate freight on the ground that their locomotive engineers, who were members of the brotherhood, would refuse to haul or handle the same, because complainant employed on its line engineers who were not members of the brotherhood, and that the threat, if carried out, would work irreparable injury to the complainant, and praying that the defendant companies, their employees and servants, be enjoined from refusing to receive and deliver such interstate freight. A temporary injunction as prayed was granted by Ricks, J. Immediately after the strike Arthur sent a dispatch to the proper chairmen of committees of the brotherhood on eleven different roads, connecting with or in the vicinity of complainant's lines, which dispatch was as follows: "There is a legal strike in force upon the Toledo, Ann Arbor & North Michigan Railroad. See that the men on your road comply with the laws of the brotherhood. Notify your general manager." The law referred to in this dispatch was as follows: "Twelfth, That hereafter, when an issue has been sustained by the grand chief, and carried into effect by the brotherhood of locomotive engineers, it shall be recognized as a violation of obligation for a member of the brotherhood of locomotive engineers association, who may be employed on a railroad running in connection with or adjacent to said road, to handle the property belonging to said railroad or system in any way that may benefit said company in which the brotherhood of locomotive engineers is at issue until the grievance or issue of whatever nature or kind has been amicably settled." By the rules of the order a "violation of obligation" by a member of the order subjected him to expulsion. Pending negotiations between the complainant and its striking engineers, compliance with rule twelve was postponed by Arthur, but these negotiations having failed Arthur, on March 18th, sent a new order of the same tenor as the first above given. Thereupon the complainant amended its bill, making Arthur a party defendant. As to Arthur, the amendment charges that he, as chief of the brotherhood exercises a controlling influence upon its members in all matters treated by its rules and regulations; that one of its rules requires all of its members in the employ of any railway company, whenever an order to that effect shall be given by its said chief officer, to refuse to receive, handle, or carry cars of freight from any other railroad company whose employees,

members of said association, have engaged in a strike; that such a strike has been declared against the complainant by the members of the brotherhood, with Arthur's consent and approval; that Arthur now publically announces that, unless complainant shall submit to the demands of its striking employes, he will order the rule above stated enforced; that the rule is in direct contravention of the interstate commerce law, and is intended to induce the employees of the defendant companies to violate that law and the previous order of the court; and that Arthur, with others, is conspiring to that end. The amendment prayed for an order against Arthur, restraining him from issuing, promulgating, or continuing in force any rule or order of said brotherhood, which shall require or command any employees of any of defendant railway companies herein to refuse to handle and deliver any cars of freight in course of transportation from one state to another to the complainant, or from refusing to receive and handle cars of such freight which have been hauled over complainant's road; and also from in any way, directly or indirectly, endeavoring to persuade any of the employees of the defendant railway companies whose lines connect with the railroad of complainant not to extend to said company the same facilities for interchange of interstate traffic as are extended by said companies to other railway companies. An order was granted as prayed by Taft, J., on an *ex parte* application, and after a full hearing before Judges Taft and Ricks the order was confirmed and continued in force to the final hearing of the case. The opinion of Taft, J., on this motion is reported in Toledo, etc., R. Co. v. Pennsylvania R. Co., 54 Fed. Rep. 730. In compliance with the mandatory order of the court, Arthur rescinded his last order enjoining obedience to rule twelve of the brotherhood.

The court held that Arthur and his confederates, in attempting to carry out rule twelve as proposed, were guilty of a criminal conspiracy to injure the complainant and to violate the interstate commerce law; that they were liable civilly to the complainant for any loss inflicted upon it by them in pursuance of the conspiracy, and that a court of equity had jurisdiction to prevent Arthur from issuing the order to enforce rule twelve, or to compel him to rescind the order which he had given.

In discussing the first point the court says; "But it is said that it cannot be unlawful for an employe either to threaten to quit or actually to quit the service when not in violation of his contract, because a man has the inalienable right to bestow his labor where he will, and to withhold his labor as he will. Generally speaking, this is true, but not absolutely. If he uses the benefit which his labor is or will be to another, by threatening to withhold it or agreeing to bestow it, or by actually withholding it or bestowing it, for the purpose of inducing, procuring or compelling that other to commit an unlawful or criminal act, the withholding or bestowing of his labor for such a purpose is itself an unlawful and criminal act. The same thing is true with regard to the exercise of the right of property. A man has the right to give or sell his property where he will, but if he give or sell it, or refuse to give or sell it, as a means of inducing or compelling another to commit an unlawful act, his giving or selling it or refusal to do so is itself unlawful.

"Herein is found the difference between the act of the employes of the complainant company in combining to withhold the benefit of their labor from

it and the act of the employes of the defendant companies in combining to withhold their labor from them; that is, the difference between the strike and the boycott. The one combination, so far as its character is shown in the evidence, was lawful, because it was for the lawful purpose of selling the labor of those engaged in it for the highest price obtainable, and on the best terms. The probable inconvenience or loss which its employes might impose on the complainant company by withholding their labor would, under ordinary circumstances, be a legitimate means available to them for inducing a compliance with their demands. But the employes of defendant companies are not dissatisfied with the terms of their employment. So far as appears, those terms work a mutual benefit to employer and employed. What the employes threaten to do is to deprive the defendant companies of the benefit thus accruing from their labor, in order to induce, procure, and compel the companies and their managing officers to consent to do a criminal and unlawful injury to the complainant. Neither law nor morals can give a man the right to labor or withhold his labor for such a purpose.

"It may be noted, in passing, that the enforcement of rule 12 presents a much stronger case of illegality than the ordinary boycott. As usually understood, a boycott is a combination of many to cause a loss to one person by coercing others, against their will, to withdraw from him their beneficial business intercourse, through threats that, unless those others do so, the many will cause similar loss to them. Ordinarily, when such a combination of persons does not use violence, actual or threatened, to accomplish their purpose, it is difficult to point out with clearness the illegal means or end which makes the combination an unlawful conspiracy; for it is generally lawful for the combiners to withdraw their intercourse and its benefits from any person, and to announce their intention of doing so, and it is equally lawful for the others, of their own motion, to do that which the combiners seek to compel them to do. Such combinations are said to be unlawful conspiracies, though the acts in themselves and considered singly are innocent, when the acts are done with malice, i. e. with the intention to injure another without lawful excuse. See the judgment of Lord Justice Bowen in *Steamship Co. v. McGregor*, 23, Q. B. Div. 598; *Walker v. Cronin*, 107 Mass. 555; *Casey v. Typographical Union*, 45 Fed. Rep. 185; *Steamship Co. v. McKenna*, 80 Fed. Rep. 48; *State v. Glidden*, 55 Conn. 26. 2 Atl. Rep. 200. *State v. Stewart* 16 Vt. 272. 2 Atl. Rep. 550. *Crumm v.*

servants and employees, from refusing to handle the interstate traffic to or from the complainant company, disclaims any right to compel the employees of the defendants to continue in defendant's employ and to continue to handle such traffic. On this point the court says: " They may avoid obedience to the injunction by actually ceasing to be employees of the company: otherwise, the injunction would be, in effect, an order on them to remain in the service of the company, and no such order was ever, so far as the authorities show, issued by a court of equity. It is true that if they quit the service of the company in execution of rule 12, in order to procure or compel defendant companies to injure the complainant company, they are doing an unlawful act, rendering themselves liable in damages to the complainant if any injury is thereby inflicted, and that they may be incurring a criminal penalty, as already explained, but, no matter how inadequate the remedy at law, the arm of a court of equity cannot be extended by mandatory injunction to compel the enforcement of personal service as against either the employer or employed. *Stocker v. Brockelbank*, 3 Mack. & G. 250; *Johnson v. Railroad Co.* 3 DeGex. M. & G. 914; *Pickering v. Bishop of Ely*, 2 Younger & C. Ch. 249; *Lumley & Wagner*, 1 DeGex. M. & G. 604. The reason is obvious. It would be impracticable to enforce the relation of master and servant against the will of either. Especially is this true in the case of railway engineers, where nothing but the most painstaking and devoted attention on the part of the employee will secure a proper discharge of his responsible duties; and it would seem to be even against public

against the members of a typographical union who had instituted a boycott against a newspaper, and who were attempting to drive away business from it by threatening its subscribers and advertisers to boycott them in case they continued their patronage. In *Emack v. Kane*, 84 Fed. Rep. 47, Judge Blodgett granted an injunction against persons who, by threatening infringement suits, without any intention of bringing them, were attempting to interfere with plaintiff's enjoyment of his lawful patent. And in *Coeur D'Alene Consol. & Min. Co. v. Miners' Union*, 51 Fed. Rep. 260, Judge Beatty enjoined the members of a Union from intimidating plaintiff's workmen, and thereby preventing them from continuing in its employ. Arthur's proposed invasion of complainant's rights, in the means to be employed, and the character of the injury intended, is quite like the wrongs enjoined in the cases just cited. It would seem from the foregoing authorities that we may enjoin Arthur from directing the engineers to quit work, for the purpose of coercing the defendant companies to violate the law and complainant's rights. Though we cannot enjoin the engineers from unlawfully quitting, it does not follow that we may not enjoin Arthur from ordering them to do so.

Further proceedings were had in this case upon an application to attach certain engineers for contempt in violating the original injunction issued in the case. *Toledo, etc., R. Co. v. Pennsylvania R. Co.* 54 Fed. Rep. 746. This application was heard and decided by Ricks, J. In these proceedings the validity of the original order was attacked, but the propriety of the order and the jurisdiction of the court to make it were fully confirmed. The court says; "It is said the orders issued in this case are without precedent. Every just order or rule known to equity courts was born of some emergency to meet some new conditions, and was, therefore, in its time, without precedent. If based on sound principles, and beneficent results follow their enforcement, affording necessary relief to the one party without imposing illegal burdens on the other, new remedies and unprecedented orders are not unwelcome aids to the chancellor to meet the constantly varying demands for equitable relief." *Joy. v. St. Louis*, 188 U. S. 1; *Coe v. Railroad Co.* 3 Fed. Rep. 775; *Beadel v. Perry, L. R.* 8 Eq. 465, are referred to in support of the order.

The court found that three of the defendants had quit the employment of the defendant company rather than violate, as they otherwise must do, either the mandate of the court or the rules of the brotherhood to which they belonged, and it was held that they were not guilty of contempt in so doing. Referring to these defendants, the court says; "The proof is clear that all of these engineers and firemen fully understood the order of the court, and knew that if they continued in the company's service they would be compelled to obey it. Rather than do that, they quit their employment. Had they the right to do so under the circumstances surrounding them? The train which they refused to haul was safely stored in the company's yard. No special injury resulted from their refusal to continue in the service. No lives were imperilled, no property jeopardized by their act. The facts clearly present extreme cases, where a court of equity is asked to enforce the performance of contracts for personal service. The engineers were all bound, by their terms of employment, to haul that train to Detroit. They had been regularly called for service, and entered upon it, and were in law ob-

ligated to continue in that service for the period of 12 hours, which covered their run. They have broken their contract, and the employer has its remedy at law, inadequate though it be. But this court recognizes to its fullest extent the large measure of personal liberty permitted to employes, and, while it feels they have violated their contract of service, it disclaims any power to compel them to continue that service against their will, under the facts of this case. The insuperable difficulties attending an attempt to enforce the performance of continuous personal service have heretofore deterred courts of equity from undertaking to grant relief in such cases. But in the varying circumstances under which the employer's rights to such relief are presented it often happens that adequate protection is possible by restraining the employes from refraining to do acts which they have combined and conspired to do, and the inhibiting of which secures the relief to which the employer is clearly entitled. By such modes of procedure courts of equity are often able to afford protection where they could not do it by attempting to enforce specific performance. But it is urged that, while the court might not have had the power to compel performance of service in these cases, it has power to punish for contempt those who refused to obey its orders. But if the court could not compel the employe to perform by continuing in service, it would not be a contempt of court on the employe's part to exercise the right to quit the service. If the employe quits in good faith, unconditionally and absolutely, under such circumstances as are now under consideration, he is exercising a personal right which cannot be de-

severe penalties and losses would follow for such neglect. An implied obligation was therefore assumed by the employees upon accepting service from it under such conditions that they would perform their duties in such manner as to enable it not only to discharge its obligations faithfully, but also to protect it against irreparable losses and injuries and excessive damages by any acts of omission on their part. One of these implied conditions on their behalf was that they would not leave its service or refuse to perform their duties under circumstances when such neglect on their part would imperil lives committed to its care, or the destruction of property involving irreparable loss and injury, or visit upon it severe penalties. In ordinary conditions as between employer and employe, the privilege of the latter to quit the former's service at his option cannot be prevented by restraint or force. The remedy for breach of contract may follow to the employer, but the employe has it in his power to arbitrarily terminate the relations, and abide the consequences. But these relative rights and powers may become quite different in the case of the employees of a great public corporation, charged by the law with certain great trusts and duties to the public. An engineer and fireman, who start from Toledo with a train of cars filled with passengers destined for Cleveland, begin that journey under contract to drive their engine and draw the cars to the destination agreed upon. Will it be claimed that this engineer and fireman could quit their employment when the train is part way on its route, and abandon it at some point where the lives of the passengers would be imperiled, and the safety of the property jeopardized. The simple statement of the proposition carries its own condemnation with it. The very nature of their service, involving as it does the custody of human life, and the safety of millions of property, imposes upon them obligations and duties commensurate with the character of the trusts committed to them. They represent a class of skilled laborers, limited in number, whose places cannot always be supplied. The engineers on the Lake Shore & Michigan Southern Railroad operate steam engines moving over its different divisions 2,500 cars of freight per day. These cars carry supplies and material, upon the delivery of which the labor of tens of thousands of mechanics is dependant. They transport the products of factories whose output must be speedily carried away to keep their employes in labor. The suspension of work on the line of such a vast railroad, by the arbitrary action of the body of its engineers and firemen, would paralyze the business of the entire country, entailing losses and bringing disaster to thousands of unoffending citizens. Contracts would be broken, perishable property destroyed, the traveling public embarrassed, injuries sustained, too many and too vast to be enumerated. All these evil results would follow to the public because of the arbitrary action of a few hundred men, who, without any grievance of their own, without any dispute with their own employer as to wages or hours of service, as appears from the evidence in this case, quit their employment to aid men, it may be, on some road of minor importance, who have a difference with their employer which they fail to settle by ordinary methods. If such ruin to the business of employers, and such disasters to thousands of the business public, who are helpless and innocent, is the result of conspiracy, combination, intimidation, or unlawful acts of organizations of employees, the courts have the power to grant partial relief, at least by con-

[illegible]

Council of New Orleans et al., 54 Fed. Rep. 994, a bill was filed by the United States under the federal anti-trust law against the various labor organizations of New Orleans, to prevent interference with interstate and foreign commerce. The facts are thus stated by Billings, J.: "A difference had sprung up between the warehousemen and their employes and the principal draymen and their subordinates. With the view and purpose to compel an acquiescence on the part of the employers in the demands of the employed, it was finally brought about by the employed that all the union men—that is, all the members of the various labor associations—were made by their officers, clothed with authority under the various charters, to discontinue business, and one of these kinds of business was transporting goods which were being conveyed from state to state, and to and from foreign countries. In some branches of business the effort was made to replace the union men by other workmen. This was resisted by the intimidation springing from vast throngs of the union men assembling in the streets, and in some instances by violence; so that the result was that, by the intended effects of the doings of these defendants, not a bale of goods constituting the commerce of the country could be moved."

The injunction was granted as prayed. The court says: "The question simply is, do these facts establish a case within the statute? It seems to me this question is tantamount to the question, could there be a case under the statute? It is conceded that the labor organizations were at the outset lawful. But, when lawful forces are put into unlawful channels,—i. e. when lawful associations adopt and further unlawful purposes and do unlawful acts,—the associations themselves become unlawful. The evil, as well as the unlawfulness, of the act of the defendants, consists in this: that, until certain demands of theirs were complied with, they endeavored to prevent, and did prevent, everybody from moving the commerce of the country. What is meant by "restraint of trade" is well defined by Chief Justice Savage in *People v. Fisher*, 14 Wend. 18. He says: 'The mechanic is not obliged by law to labor for any particular price. He may say that he will not make coarse boots for less than one dollar per pair; but he has no right to say that no other mechanic shall make them for less. Should the journeymen bakers refuse to work unless for enormous wages, which the master bakers could not afford to pay, and should they compel all journeymen in the city to stop work, the whole population must be without bread; so of journeymen tailors or mechanics of any description. Such combinations would be productive of derangement and confusion, which certainly must be injurious to trade.' It is the successful effort of the combination of the defendants to intimidate and overawe others who were at work in conducting or carrying on the commerce of the country, in which the court finds their error and their violation of the statute. One of the intended results of their combined action was the forced stagnation of all the commerce which flowed through New Orleans. This intent and combined action are none the less unlawful because they included in their scope the paralysis of all other business within the city as well."

To the objection that the anti-trust law was not aimed at combinations of laborers, the court says: "I think the congressional debates show that the statute had its origin in the evils of massed capital; but, when the congress came to formulating the prohibition which is the yardstick for measuring the

suits. The following cases were cited as in point: *Emack v. Kane*, 84 Fed. Rep. 47; *Casey v. Typographical Union*, 45 Fed. Rep. 135, 144; *Gilbert v. Mickle*, 4 Sandf. Ch. 381, *357; *Sherry v. Perkins*, 147 Mass. 312; 17 N. E. Rep. 307.

On appeal, the decision of Billings, J. was unanimously affirmed by the court of appeals, three judges concurring, and the opinion of Billings, J. was approved. *Hagan v. Blindell*, 56 Fed. Rep. 696.

10. Indictments under federal anti-trust law. The sufficiency of indictments under the federal anti-trust law and various questions in regard to the construction and effect of the law are considered in the following cases. *United States v. Greenhut*, 50 Fed. Rep. 469; *In re Corning*, 51 Fed. Rep. 205; *In re Terril*, 51 Fed. Rep. 218; *In re Greene*, 53 Fed. Rep. 104; *United States v. Patterson*, 54 Fed. Rep. 1005.

11. Validity of statute requiring officer or agent of corporation to make disclosure as to whether such corporation has entered into any unlawful combination. This question is considered in *State ex rel. Attorney-General v. Simmons Hardware Co.*, 109 Mo. 118; 18 S. W. Rep. 1125, where it is held that; Section 6 of the act of 1889 "for the punishment of pools, trusts, and conspiracies," requiring some officer of every corporation to inform, under oath, the secretary of state (under penalty of fine, imprisonment, etc.) whether such company has violated said act, is in conflict with the constitutional declaration that "no person shall be compelled to testify against himself in a criminal cause," and it is therefore void. See also *Counselman v. Hitchcock*, 142 U. S. 547.

12. Miscellaneous cases. We refer to the following additional cases on the subject of contracts and combinations in restraint of trade: *Pacific Trader Co. v. Adler*, 90 Cal. 110; 27 Pac. Rep. 86; *Vulcan Powder Co. v. Hercules Powder Co.*, 96 Cal. 510; 81 Pac. Rep. 581, 583; *State v. Glidden*, 55 Conn. 46; *Anderson v. Jett*, 89 Ky. 375; 12 S. W. Rep. 670; *Commonwealth v. Allen*, 4 Met. 111; *Brown v. Matheson*, 14 Allen, 499; *Carew v. Rutherford*, 106 Mass. 1; *Walker v. Cronin*, 107 Mass. 555; *Central Shade Roller Co. v. Cushman*, 143 Mass. 853; *Bishop v. Palmer*, 146 Mass. 469; *Gamewell Fire Alarm Tel. Co. v. Crane (Mass.)*, 35 N. E. Rep. 98; *Ford v. Gregson*, 7 Mon. 89; *De Witt Wire Cloth Co. v. New Jersey Wire Cloth Co.*, 14 N. Y. S. 277; *Strait v. National Harrow Co.*, 18 N. Y. S. 224; *Buffalo Lubricating Oil Co. v. Standard Oil Co.*, 106 N. Y. 669; *Hoge v. Sloan*, 107 N. Y. 244; *State v. Donaldson*, 82 N. J. L. 151; *Commonwealth v. Carlisle*, *Brightly*, Pa. 36; *Moore v. Bricklayer's Union*, 23 Weekly L. B. 48; *State v. Stewart*, 59 Vt. 273; *Crump v. Commonwealth*, 84 Va. 927; *Gibbs v. Baltimore Gas Co.*, 180 U. S. 896; *Fowle v. Park*, 131 U. S. 88; *Troy Laundry Machine Co. v. Dolph*, 136 U. S. 617; *Central Transportation Co. v. Pullman Palace Car Co.*, 139 U. S. 24; 4 Am. R. R. & Corp. Rep. 173.

DEAN, J.—The defendants were members of the Planing Mill Association, of Allegheny county, and Builders' Exchange, of Pittsburgh. The different partnerships and individuals composing these associations were in the business of contracting and building, and furnishing building material of all kinds. On the 1st of May, 1891, there was a strike of the carpenters, masons, and bricklayers in the building trades, bringing about, to a large extent, a stoppage of building. The men demanded an eight-hour day, with no reduction in wages theretofore paid, which the employers refused to grant. Then a strike by the unions of the different trades was declared. The plaintiff, at the time, was doing business in the city of Pittsburgh, as a dealer in building materials. He was not a member of either the Planing Mill Association, or the Builders' Exchange. There were also contractors and builders, who belonged to neither of these organizations, who conceded the demands of the workmen. They sought to secure building material from dealers, wherever they could, and thus go on with their contracts. If they succeeded in purchasing the necessary material, the result would be that at least some of the striking workmen would have employment at a higher rate of wages than the two associations were willing to pay. The tendency of this was to strengthen the cause of the strikers, for those employed were able to contribute to the support of their fellow workmen who were idle. The two associations already named sought to enlist all concerned, as contractors and builders, or as dealers in supplies, whether members of the associations or not, in the furtherance of the one object,—resistance to the demands of the workmen. The plaintiff and six other individuals or firms engaged in the same business, refused to join them, and undertook to continue sales of building material to those builders who had conceded the eight-hour day. The Planing Mill Association and Builders' Exchange tried to limit their ability to carry on work at the advance by inducing lumber dealers and others to refrain from shipping or selling them, in quantities, the lumber and other material necessary to carrying on the retail business. In several instances their efforts were successful, and the plaintiff did not succeed in purchasing lumber from certain of the wholesale dealers in Cleveland and Dubois, where he wanted to buy. The defendants were active members of one or other or both of the associations

individual dealers, they had a clear right to do. They could sell and deliver their material to whom they pleased. But they also went further. They agreed among themselves that no member of the association would furnish supplies to those who were in favor of, or had conceded, the eight-hour day, and that they would dissuade other dealers, not members of the associations, from furnishing building material to such contractors or retail dealers. To the extent of their power, this agreement was carried out. This, clearly, was combination, and the acts of assembly referred to do not, in terms, embrace employers. They only include, within their express terms, workmen. Hence, it is argued by counsel for appellee, these defendants are subject to all the common-law liability of conspirators, in their attempts to resist the demands for increased wages; that is, there can be a combination among workmen to advance wages, but there can be no such combination of employers to resist the advance. That which, by statute, is permitted to the one side, the common law still denies to the other. If this position be well taken, we then have this inequality: The plaintiff, who is aiding a combination, either directly or indirectly, intentionally or unintentionally, to advance wages, sues, for damages, members of another combination, who resist the advance. Nor is there any difference in the character of the acts or means on both sides in furtherance of their purposes. The workmen will not work themselves, and they use persuasion and reason with their fellows to keep them from going to work, until the demand is conceded. The employers will not sell to contractors who conceded the demand, and they do their best to persuade others engaged in the same business from doing so. Then, the element of real damage to plaintiff is absent. By far the larger number of dealers in the city and county were members of the combination which refused to sell. Only the plaintiff and six others refused to enter the combination. The result was that these seven had almost a monopoly of furnishing supplies to all builders who conceded the advance. Plaintiff admits in his own testimony that thereby his business and profits largely increased. In a few instances, he paid more to wholesale dealers, and put in more time buying, than he would have done if the associations had not interfered with those who sold him. But it is not denied that as a result of the combination he was, individually, a large gainer.

True, he avers that if defendants had gone no further than to refuse to sell, themselves, he would have made a great deal more money; that is, he did not make as large a sum as he would have made if they had not dissuaded others, not members of the association, from selling to him. But that, by the fact of the combinations and strike, he was richer at the end than when they commenced.

We then have these facts, somewhat peculiar in the administration of justice: A plaintiff suing and recovering damages for an alleged unlawful act, of which he himself, in so far as he aided the workmen's combination, is also guilty, and both acts springing from the same source,—a contest between employers and employed as to the price of daily wages,—and then the further fact that this contest, instead of damaging him, resulted largely to his profit. We assume, so far as concerns defendants, if their agreement was unlawful, or, if lawful, it was carried out by unlawful acts, to the damage of plaintiff, the judgment should stand. All the authorities of this state go to show that, while the act of an individual may not be unlawful, yet the same act, when committed by a combination of two or more, may be unlawful and therefore be actionable. A dictum of Lord Denman in *Rex v. Seward*, 1 Adol. & E. 711, gives this definition of a "conspiracy:" "it is either a combination to procure an unlawful object, or to procure a lawful object by unlawful means." This leaves still undetermined the meaning to be given the words "lawful" and "unlawful" in their connection in the antithesis. An agreement may be unlawful in the sense that the law will not aid in its enforcement, or recognize it as binding upon those who have made it, yet not unlawful in the sense that it will punish those who are parties to it, either criminally or by a verdict in damages. Lord Denman is reported to have said afterwards in *Reg. v. Peck*, 9 Adol. & E. 690, that his definition was not very correct. See note to section 2291, 3 Whart. Crim. Law. It is conceded, however, in the case in hand, any one of the defendants, acting for himself, had a right to refuse to sell to those favoring the eight-hour day, and so, acting for himself, had the right to dissuade others from selling. If the act were unlawful at all, it was because of the combination of a number. Gibson, J., in *Com. v. Carlisle*, Brightly, N. P. 40, says: "Where the act is lawful for the individual, it can be the subject

of conspiracy, when done in concert, only where there is a direct intention that injury shall result from it, or where the object is to benefit the conspirators to the prejudice of the public or the oppression of individuals and where such prejudice or oppression is the natural and necessary consequence." In the same case it is held: "a combination is criminal wherever the act to be done has a necessary tendency to prejudice the public, or to oppress individuals by unjustly subjecting them to the power of the confederacy, and giving effect to the purpose of the latter, whether of extortion or mischief. According to this view of the law, a combination of employers to depress the wages of journeymen below what they would be if there was no recurrence to artificial means on either side is criminal." This case puts the law against the combination in as strong terms, if not stronger, than any others of our own state. The significant qualification of the general principle, as mentioned in the last three lines, will be noticed: "If there was no recurrence to artificial means on either side." The prejudice to the public is the use of artificial means to affect prices, whereby the public suffers. A combination of stock brokers, to corner a stock; of farmers, to raise the price of grain; of manufacturers, to raise the price of their product; of employers, to reduce the price of labor; of workmen, to raise the price,—were at the date of that decision, at common law, all conspiracies. The fixed theory of courts and legislators then was that the price of everything ought to be, and in the absence of combination necessarily would be, regulated by supply and demand. The first to deny the justice of this theory, and to break away from it, was labor; and this was soon followed by the legislation already noticed, relieving workmen from the penalties of what for more than a century had been declared unlawful combinations or conspiracies. Wages, it was argued, should be fixed by the fair proportion labor had contributed in production. The market price, determined by supply and demand, might or might not be fair wages—often was not,—and as long as workmen were not free, by combination, to insist on their right to fair wages, oppression by capital, or, which is the same thing, by their employers, followed. It is not our business to pass on the soundness of the theories which prompt the enactment of statutes. One thing, however, is clear: The moment the legislature relieves one, and by far the larger

number, of the citizens of the commonwealth from the common-law prohibitions against combinations to raise the price of labor, and by a combination the price was raised, down went the foundation on which common-law conspiracy was based, as to that particular subject. Before any legislation on the question, it was held that a combination of workmen to raise the price of labor, or of employers to depress it, was unlawful, because such combination interfered with the price, which would otherwise be regulated by supply and demand. This interference was in restraint of trade or business, and prejudicial to the public at large. Such combination made an artificial price. Workmen, by reason of the combination, were not willing to work for what, otherwise, they would accept. Employers would not pay what, otherwise, they would consider fair wages. Supply and demand consists in the amount of labor for sale, and the needs of the employer who buys. If more men offered to sell labor than are needed, the price goes down, and the employer buys cheap. If fewer than required offer, the price goes up, and he buys dear. As every seller and buyer is free to bargain for himself, the price is regulated solely by supply and demand. On this reasoning was founded common law conspiracy, in this class of cases. But in this case the workmen, without regard to the supply of labor, or the demand for it, agreed upon what, in their judgment, is a fair price, and then combined in a demand for payment of that price. When refused, in pursuance of the combination, they quit work, and agree not to work, until the demand is conceded. Further, they agree by lawful means, to prevent all others, not members of the combination, from going to work until the employers agreed to pay the price fixed by the combination. And thus, as long as no force was used, or menaces to person or property, they had a lawful right to do; and, so far as is known to us, the rise demanded by them may have been a fair one. But it is nonsense to say that this was a price fixed by supply and demand. It was fixed by a combination of workmen on their combined judgment as to its fairness; and, that the supply might not lessen it, they combined to prevent all other workmen in the market from accepting less. Then followed the combination of employers, not to lower the wages theretofore paid, but to resist the demand of a combination for an advance; not to resist an advance which would naturally follow a limited

supply in the market, for the supply, so far as the workmen belonging to the combination were concerned, was, by combination, wholly withdrawn, and, as to workmen other than members, to the extent of their power, they kept them out of the market. By artificial means the market supply was almost wholly cut off. The combination of the employers, then, was not to interfere with the price of labor, as determined by the common-law theory, but to defend themselves against a demand made altogether regardless of the price, as regulated by the supply. The element of an unlawful combination to restrain trade because of greed of profit to themselves, or of malice toward plaintiff or others, is lacking, and this is the essential element on which is founded all the decisions as to common-law conspiracy in this class of cases; and, however unchanged may be the law as to combinations of employers to interfere with wages, where such combinations take the initiative, they certainly do not depress a market price, when they combine to resist a combination to artificially advance price. "The reason of the law is the life of the law," and, as given in the cases cited by appellee, irresistibly impels to the conclusion that the combination here was not unlawful; a conclusion which is clearly indicated in *Com. v. Carlisle, supra*,—that it would not be unlawful if there was first recurrence to artificial means by workmen to raise the market price. Here, the first step provocative of a combination by the employers was an attempt, by lawful, artificial means on part of the workmen to control the supply of labor, preparatory to a demand for an advance. Nor does the fact that the appellee was not a workman, nor a member of any of the unions of workmen, put him in any better attitude than if he were. He undertook, for his own profit, to aid the cause of the workmen. His right so to do was unquestionable. But if the employers, by a lawful combination, could limit his ability so to do, they did not make themselves answerable in damages to him for the consequences of a lawful act.

The case of *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173, is not in point. It was the attempt to enforce the collection of a draft given by one member of a combination formed to raise the price of coal to another, in consideration of certain stipulations in the agreement. It was held that the combination, being in re-

straint of trade, was unlawful, and, as the draft was given in pursuance of the unlawful contract, it, also, was tainted with the illegality, and there could be no recovery. But, if the agreement itself were not unlawful, were the methods to carry it out unlawful? If the employers' combination here had used illegal methods or means to prevent other dealers from selling supplies to plaintiff, the conspiracy might still have been found to exist. The threats referred to, although what are usually termed "threats," were not so in a legal sense. To have said they would inflict bodily harm on other dealers or villify them in the newspapers, or bring on them social ostracism, or similar declarations,—these the law would have deemed threats, for they may deter a man of ordinary courage from the prosecution of his business in a way which accords with his own notions. But to say—and even that is inferential from the correspondence—that if they continued to sell to the plaintiff the members of the association would not buy from them, is not a threat. It does not interfere with the dealer's free choice. It may have prompted him to a somewhat sordid calculation. He may have considered which custom was most profitable, and have acted accordingly. But this was not such coercion and threats as constituted the acts of the combination unlawful. *Rogers v. Dutt*, 13 Moore P. C. 209; *Bowen v. Matheson*, 14 Allen, 499; *Manufacturing Co. v. Hollis* (Minn.), 55 N. W. Rep. 1119 (not yet officially reported). On the main question the case last cited goes further than we are called upon to go, as yet, in this state. It holds that what is not unlawful when done by an individual cannot be unlawful when done by many, and, therefore, the combination not to deal with those who broke the rules of the association was not a conspiracy. For this a number of cases from other states, as well as from England, are cited. But the law in this state has heretofore been determined otherwise, from a very early day, by an unbroken line of decisions, which here call for no qualification; for, so far as concerns the facts of this case, the legislature has so changed the law as to render these decisions inapplicable. We concede, however, that the decisions of other courts are by no means uniform. Mr. Wright, in his work on the Law of Criminal Conspiracies and Agreements (London, 1873), says: "It is conceived that, on a review of all the decisions, there is a great preponderance of authority in favor of the proposition that as a rule

an agreement or combination is not criminal, unless it be for acts or omissions, whether as ends or means, which would be criminal, apart from agreement." Logically, the same rule would apply, as was held in *Manufacturing Co. v. Hollis*, to combinations which, although not criminal, are alleged to be unlawful. But without regard to whether the general rule be settled by weight of authority, as claimed by appellants, we hold here that this combination was not unlawful, because (1) it was not made to lower the price of wages, as regulated by the supply and demand, but to resist an artificial price made by a combination which, by statute, was not unlawful; (2) the methods adopted to further the objects of the combination were not unlawful.

Another point has been most earnestly pressed upon our consideration by counsel for appellants. It is argued that, under our declaration of rights, either the acts of assembly of 1869, 1872, 1876, and 1891, exempting employees from the penalties of unlawful combinations to fix the price of labor, are void, because, by their terms, they embrace only a particular class of citizens of the commonwealth, or their scope must be enlarged beyond the express terms of these acts, so as to include within their protection all those interested in the same subject of legislation. It is argued that it is not within the power of the legislature to declare some citizens innocent of any offense against the law, for the very same act which, when committed by some others in the same business, the law will still hold to be criminal; that what the statute declares is not conspiracy in one case cannot, under the law, be conspiracy in the other; and therefore, in every contest of this kind between workmen and employers, the statute if not void, must at least be held to operate equally to the exemption of all citizens interested in the subject affected by the combination. If there be nothing criminal in a combination to artificially raise wages, there can be nothing criminal in an employers' combination to resist the advance, or to artificially depress them. This question is not in the case, in the view we have taken of the facts. We are at all times averse to passing on questions, the answers to which are not necessary to a decision of the case immediately before us. Much less are we inclined to discuss and decide questions involving the constitutional power of a co-ordinate branch of the

the manufacture, distribution, and sale of gas for street lighting, the laying of pipes in the streets, etc.

The defendant was incorporated under the general laws of Maine in 1888, and its purposes, under the articles of association, were to operate "a gas process for manufacturing fuel and illuminating gas from oil and other raw products; to light by gas the streets, parks, grounds, buildings, and business places of persons and corporations; to manufacture, use, supply, distribute, and furnish light, heat and motive power by gas for heating and manufacturing purposes deemed for the interest of the corporation; to erect and maintain posts and other fixtures; to lay down and maintain such underground pipes and other appurtenances as may be deemed necessary for the objects of the corporation, wherever the same may be lawfully done; to manufacture, lease purchase, and otherwise acquire, deal in, manage, use, and sell any and all machinery, fixtures, appurtenances, appliances, and plants for using and furnishing light, heat and power, and for any and all purposes for which gas is now used or may hereafter be used; to lease, purchase, or otherwise acquire, manage, control, use, and sell real and personal estate, patents, patent rights, inventions and processes and improvements thereon, and interests therein and rights thereunder, and any and all other property, privileges and easements, rights and things, whatsoever deemed necessary or convenient for carrying on the business of the corporation, with power to authorize other corporations and persons to manufacture, use, sell, and operate thereunder, and to do any and all acts and things connected with or deemed necessary for carrying on the business of the corporation and the general business of furnishing and supplying heat, light and power by means of gas; to issue bonds secured by mortgage on the property and franchise of said company for the purpose of raising money for the use of the company; and to have and exercise all the rights and powers and privileges appertaining to corporations under the general laws of the state of Maine."

For several years prior to April, 1889, the plaintiff corporation, under its charter, had supplied the citizens of Brunswick with gas. Its operations had not been financially successful. At that time it was heavily in debt, not only on account of bonds which it had issued, secured by a mortgage on its real estate and other property,

but a considerable floating debt existing as well. Some of the bonds at that time were overdue, and the holders were threatening foreclosure. At this time B. G. Dennison was the president of the Brunswick Gaslight Company, and Marcus R. Williams was president of the United Gas, Fuel & Light Company.

At the time of the execution of the lease of the Brunswick property, all the directors of the defendant company, including its president, were residents of New York city and its vicinity.

This defendant was the owner of what is known as the "Avery process for the manufacture of gas." Not long after the election of these directors, President Williams came to Maine for the purpose of introducing that process in this state.

For some time prior to said 1st day of April negotiations had been pending between these two officers relating to a lease of the plaintiff's property by the defendant company; the defendant company prior to this time having entered into possession of the gas plant in Bath, under some kind of an arrangement with the company originally operating the Bath plant. These negotiations terminated on the 1st day of April, 1889, by the execution of a lease.

Under this lease, and on the day of its execution, the defendant company entered into possession of the plaintiff's gas plant at Brunswick.

The case does not show that, prior to the execution of the lease, the directors of the defendant company expressly authorized by formal vote their president, Williams, to execute the lease in their behalf. The defendant company at the trial denied the authority of Williams to execute the lease of the Brunswick plant, but it appeared as facts in the case that the works at Brunswick and at Bath, which the defendant company admitted were operated by its authority, had a common manager, whose salary was not apportioned between them, kept common books of account, and bought supplies in common; and, further, that both works at times used the Avery process for the manufacture of gas, which the defendant company alone had the right to use.

From these facts and other testimony in the case the court found that Williams was the agent of the defendant company to arrange with the different gas companies in the state for the introduction of the Avery process; that the directors of the defendant

company had full knowledge that the works at Brunswick were operated by their company; that they acquiesced in the same and ratified the action of Williams in the premises,—no disavowal of the authority of President Williams to execute the Brunswick lease ever having been communicated to the plaintiff company prior to the commencement of this suit.

The defendant company continued to operate the Brunswick works until September 15, 1890, when voluntarily and without the fault of the plaintiff company, they abandoned the works, and ceased to operate them.

Upon these facts the court ruled as matter of law that the plaintiff company and the defendant company had power to execute the lease in question, and that the defendant company was liable in damages for the breach of the covenants contained in said lease.

The defendant company did not indorse any guaranty upon the outstanding bonds of the plaintiff company, nor did it give any guaranty to the holders of the same, further than is contained in the provisions of the lease itself. The damage sustained by the plaintiff on this account is of such an uncertain character that the court allowed the plaintiff nothing for the failure of the defendant to fulfill those covenants contained in the lease.

For prospective damages on account of the breach of covenants of the lease the court awarded the plaintiff the sum of \$4,500, less \$00, the value of defendant's improvements while in possession, the plaintiff having expressed a willingness to make a deduction equal to the difference between the value of the plant April 1, 1889, when the defendant took possession, and its value September 15, 1890, when it abandoned possession.

After hearing the evidence and arguments of each party, and considering the same, the court decided that the said indenture is the defendant's deed in manner and form as the plaintiff in its writ has declared against it, and awarded damages in the sum of \$4,986.56.

Among other provisions the lease contains the following: "The lessee covenants and agrees to guaranty during the term of this lease the present bonded indebtedness of the lessor, and its renewal, and a further issue of bonds to liquidate any or all of the lessor's existing floating indebtedness. The lessor covenanting on its part not to increase its total indebtedness during the term of its lease,

and to use all reasonable efforts to pay the same as it matures; and in all bonds of the lessor purchased by the lessee the lessee shall receive five per cent. interest per annum, payable semiannually, and may deduct said interest from the rent.

"It is further agreed that the said lessor will sell, assign, and transfer the capital stock of said Brunswick Gaslight Company, the par value thereof being fifty dollars, (\$50,) which stock is to remain at the present amount, twenty thousand dollars (\$20,000) at any time within eight years on the following basis: The said lessee is to pay for said capital stock at the rate of forty dollars (\$40,) per share."

The defendant pleaded non est factum with a brief statement, and, after judgment, took exceptions to this court.

The defense relied upon by the defendant was that the lease was negotiated and executed by an unauthorized agent, whose act were never ratified; that the plaintiff had no legal right to execute the lease, and that in so doing its acts were *ultra vires* and void; that the defendant company had no right to guaranty the bonds, and its agreement to do so was *ultra vires* and void; and that at the termination of the lease there was due the defendant company in set off, for extensions, improvements, and additions about \$1,500.

Barrett Potter for plaintiff *G. W. Heselton*, for defendant.

WALTON, J.—The question is whether a gas company, which possesses and exercises the right to lay its pipes in the public streets can sell, lease, or assign its corporate rights and privileges to another gas company, without the consent of the legislature.

We think the question must be answered in the negative. Corporations possessing and exercising the right of eminent domain owe duties to the public from the performance of which they are not allowed to escape by a sale or lease of their franchises, without first obtaining the consent of the legislature. The franchise of a corporation having the right to receive tolls may be levied on to satisfy an execution against the corporation, and in this way it may be deprived of its corporate powers and privileges; and they may be lost by the foreclosure of a legally executed mortgage; and they may also be lost by laches in reclaiming them when they have been illegally sold, leased, or assigned. But, subject to these well-defined exceptions, it is now settled by an overwhelming

weight of authority that public or quasi public corporations which possess and exercise the right of eminent domain, or its equivalent, owe duties to the public, as well as to their stockholders ; and that they cannot sell or lease their corporate powers and privileges, and thereby disable themselves from performing their public duties, without legislative authority. It is the duty of gas companies, water companies, electric light companies, telegraph and telephone companies, street-railway companies, and all similar corporations, which have obtained the right to use the public streets for erection or extension of their works, to serve the public faithfully and impartially, and at reasonable rates. And this is a duty the performance of which may be enforced by the courts. And one reason why these corporations are not allowed to sell or lease their corporate powers and franchises without legislative authority is that if they were able to do so they might thereby disable themselves from the performance of their public duties and thus escape from the power of the courts and of the legislature to enforce their performance.

But a still more serious objection to the traffic in corporate franchises is the ease with which such a power could be used to create monopolies. By its exercise, a single corporation could easily become possessed of the corporate powers and privileges of all its rivals, and thereby annihilate competition, and obtain a complete control of the markets. Such combinations are usually hurtful, and sound public policy requires that they be kept under legislative supervision and restraint.

To the argument that a similar combination may be made by individuals, it has been aptly replied that men are mortal, and their combinations short-lived, but corporations are immortal, and their combinations and acquisitions may go on forever; that they may add field to field, wealth to wealth, and power to power, till they become too strong for the government itself ; that all experience shows that such accumulations of wealth and power are dangerous to the public welfare ; and that , while society can endure the accumulations and combinations of mortals, which must end at the grave, it cannot endure similar accumulations and combinations of power by corporations, which may continue forever.

In a case in New Jersey, decided in August, 1892, it is said that

corporations which engage in a quasi public occupation, such as railway, water, gas, telegraph and similar corporations, are created upon the hypothesis that they will be a public benefit; that they usually possess the right of eminent domain, and not unfrequently the use of the public highways is accorded to them, and that, while the state confers upon them these special and extraordinary privileges, it at the same time exacts from them the performance of public duties; that such corporations hold their franchises not merely in trust for the pecuniary profit of their stockholders, but also in trust for the public; and that such corporations cannot lease or otherwise dispose of their franchises, needful in the performance of their public duties, without legislative consent. *Stockton v. Railroad Co.*, 24 Atl. Rep. 964.

In the case in Illinois, decided in 1887, the court held that reason and the weight of authority were in favor of the doctrine that a corporation has no right to sell or lease its franchise, or any property essential to its exercise, which it has acquired under the law of eminent domain, without legislative authority. *Fietsam v. Hay*, 122 Ill. 298; 13 N. E. Rep. 501.

In another case decided in 1889, a corporation for the manufacture and sale of gas, having a capital of \$25,000,000, had obtained by purchase, a controlling interest in four other gas companies, having an aggregate capital of nearly \$17,000,000; and, in the vigorous language of the court, was thus able to destroy the energies of all other corporations of the same kind, and suck the life-blood out of them; and the court held that such a combination could not be tolerated; that the business of manufacturing and distributing illuminating gas by means of pipes laid in the public streets of a city is a business of a public character; that it is the exercise of a franchise belonging to the state; that the services to be rendered for such a grant are of a public nature; and that any unreasonable restraint upon the performance of such duties is prejudicial to the public interests, and in contravention of public policy, and could not be allowed. *People v. Chicago Gas Trust Co.*, 180 Ill. 268; 22 N. E. Rep. 798.

Equally vigorous is the language of the New York court of appeals. In a case relating to the combination known as the "Sugar Trust"—a trust that included the Forest City Refining Sugar Company of this state, and so successfully sucked its life-blood out of

it that its machinery has since remained as silent as a city of the dead—the court said that corporate grants are always assumed to have been made for the public benefit, and that any conduct which destroys their normal functions, and maims and cripples their separate activity, must affect unfavorably the public interest; and that this is so to a much greater extent when a combination includes and dominates an entire industry, and puts upon the market a capital stock proudly defiant of actual values, and capable of an unlimited expansion; that it is not a sufficient answer to say that similar results may be lawfully accomplished by an individual having the necessary wealth, for it is one thing for the state to respect the freedom of the citizen, and quite an other thing to create artificial persons to aid in promoting such aggregations; that the individuals are few who hold such enormous wealth; but, if corporations can combine and mass their forces, a tempting and easy road is opened to enormous combinations, vastly exceeding in strength and in power over industry any possibilities of individual ownership. *People v. North River Sugar Refining Co.*, 121 N. Y. 582; 24 N. E. Rep. 884.

The law does not assume that all combinations of corporate powers and franchises are necessarily hurtful. It recognizes the fact that they are sometimes beneficial, and provides a way by which they may be lawfully made. But as such combinations are liable to be made for improper purposes, and with conditions annexed to them which are inadmissible, sound public policy requires that they be made under legislative supervision and restraint.

In the present case the Brunswick Gas Light Company undertook to lease all its property, and all its corporate rights and privileges, to the United Gas, Fuel & Light Company for twenty-five years. The latter company took possession of the works, and held them for seventeen and one-half months, making improvements upon them, and paying a portion of the agreed rent. It then abandoned the works, and possession was resumed by the lessors.

This is a suit by the lessors against the lessees for a breach of the covenants contained in the lease. It was contended in defense that the lease was illegal and void, and that no recovery could be had upon it. The presiding justice ruled, as a matter of law, that the plaintiff company and the defendant company had power to

execute the lease, and that a recovery could be had for a breach of the covenants contained in it. We think the ruling was erroneous. No legislative authority for making the lease was shown, and without such authority, we think the lease must be regarded as *ultra vires* and void. The authorities bearing upon the question are not in entire harmony, but the weight of authority seems to us to be overwhelmingly in favor of this conclusion. See 2 Beach, Corp. §§ 831-856, inclusive, and the six pages of authorities pro and con cited under the section last cited. The cases are too numerous for citation here, and the few cases to which we have referred will furnish a key to all of them.

But it is claimed that, inasmuch as the defendant company took and held possession of the plaintiff company's works by virtue of the lease, *ultra vires* is no defense to an action to recover the agreed rent. We do not doubt that the plaintiff company is entitled to recover a reasonable rent for the time the defendant company actually occupied the works; but do not think the amount can be measured by the *ultra vires* agreement. We think that in such cases the recovery must be had upon an implied agreement to pay a reasonable rent; and that, while the *ultra vires* agreement may be used as evidence, in the nature of an admission, of what is a reasonable rent, it cannot be allowed to govern or control the amount. It seems to us that it would be absurd to hold that the *ultra vires* lease is void, and at the same time hold that it governs the rights of the parties with respect to the amount of rent to be recovered. A void instrument governs nothing. We think the correct rule is the one stated by Mr. Justice Gray in a recent case in the United States supreme court. He said that a contract made by a corporation which is unlawful and void because beyond the scope of its corporate powers does not, by being carried into execution, become lawful and valid; and that the proper remedy of the aggrieved party is to disaffirm the contract, and sue to recover as on a *quantum meruit* the value of what the defendant has actually received the benefit of. Pittsburgh, C. & St. L. Ry. Co. v. Keokuk & H. Bridge Co., 131 U. S. 371; 9 Sup. Ct. Rep. 770. We think this is the correct rule. 2 Beach, Corp. § 423 and cases there cited.

Exceptions sustained.

PETERS, C. J. and EMERY, FOSTER, and HASKELL, JJ., concurred.*

1. Power of corporation to sell or lease entire property, or property and franchises.—See *Small v. Minneapolis Electro Matrix Co.*, 4 Am. R. R. and Corp. Rep., 81, and note; *Central Transportation Co. v. Pullman Palace Car Co.*, 4 Am. R. R. and Corp. Rep. 172; *People v. Ballard*, 6 Am. R. R. and Corp. Rep. 635; *Manchester, etc., R. R. Co. v. Concord R. R. Co.*, 8 Am. R. R. and Corp. Rep. 22, and note; *St. Louis, etc., R. R. Co. v. Terre Haute, etc., R. R. Co.*, 6 Am. R. R. and Corp. Rep. 489; 1 Am. R. R. and Corp. Rep. 240, note; *Kasun v. Buckeye Brewing Co.*, 51 Fed. Rep. 156; *Jersey City Gas Light Co. v. United Gas Imp. Co.*, 58 Fed. Rep. 828; *Cook, Stock & Stockh.*, § 667; 1 *Beach Priv. Corp.* § 857, *et seq.*

2. Sale of property to pay debts.—The board of directors of a corporation has the undoubted right to sell property of the corporation to pay its debts. *Crescent City Brewing Co. v. Flanner*, 44 La. An. 23; 10 So. Rep. 384.

3. Effect of knowledge and acquiescence of stockholders as a ratification.—The stockholders of a corporation, having had knowledge of the action of the directors in directing all its property to be sold and conveyed, and not having taken any steps to condemn or prevent it, will be held to have ratified the execution and delivery of the deed. *Stokes v. Detrick*, 75 Md. 256; 23 Atl. Rep. 846.

PRUE V. NEW YORK, P. & B. R. CO.

(Supreme Court of Rhode Island. Aug. 14, 1898.)

1. RAILROAD COMPANIES—ACCIDENT AT CROSSING—WHEN DEFENDANT LIABLE THOUGH PLAINTIFF GUILTY OF CONTRIBUTORY NEGLIGENCE.—Though the plaintiff may have been guilty of negligence, and though that negligence may, in fact, have contributed to the accident, yet if the defendant could, by the exercise of ordinary care, have avoided the mischief which happened, the plaintiff's negligence will be no defense. In such case the defendant's failure to exercise ordinary care is the proximate cause of the accident, and the plaintiff's negligence the remote cause.


2. SHUTTING GATES AT CROSSING SO AS TO PREVENT PLAINTIFF FROM CLEARING TRACK—QUESTION FOR JURY.—Deceased was driving a load of hay over a double-track crossing, provided with gates, a gate tender, and an electric alarm. There were two trains coming from opposite directions, and the alarm began to ring before deceased reached the tracks. While he was on the east track, two persons shouted to him to stop, but they did not know whether he understood, nor was it shown whether he could then prudently retreat. The gates were worked together, and the east one fell on the middle of his load, while the west one prevented his escape forward. He was struck by the train on the west track. One witness swore positively that deceased could

* Reported in 27 Atl. Rep. 525.

have got across had the west gate been open, and was more or less corroborated by two others. *Held*, that the question of proximate cause should have been left to the jury.

Elisha C. Mowry and Livingston Scott, for plaintiff. *Walter B. Vincent and Amasa M. Eaton*, for defendant.

ROGERS, J.—Andre Blais, the plaintiff's intestate was fatally injured while driving a load of hay across the defendant's track at a grade crossing on Hamlet avenue, a public street in the outskirts of the city of Woonsocket, November 12, 1891, at 6:15 p. m.; and this action is brought to recover damages for his death, occasioned by the alleged negligence of the defendant in running a train of cars, and in the management of the crossing gates at said crossing. At the trial of the case before a jury, the presiding justice at the close of the plaintiff's testimony, nonsuited the plaintiff, on the ground that the plaintiff's intestate was guilty of contributory negligence, and the question now arising on petition for a new trial is whether the nonsuit was properly granted. The crossing where the accident occurred is upon a curve in the railroad towards the west, the railroad being double tracked and running north-westerly, so that it crosses the avenue diagonally, as the latter runs nearly east and west, and Blais was approaching from the east. Crossing gates, with a gate tender, and an automatic electric alarm, were provided by the defendant. While there is not entire accord as to where Blais was when the electric alarm began to ring,—for there were two trains approaching the Hamlet crossing at the time, one on the east track, coming from Woonsocket, and the other on the east track, coming at the rate of forty miles an hour from Providence,—yet there can be no doubt from the testimony of those having the best opportunity to know that the electric bell began to ring before Blais reached the tracks, as Bauchemin testified that it began to ring when he (the witness) was on the first or east track, and he was going the same way as Blais, and was driving the second team ahead of Blais, there being a team behind him between the one he was driving, and the one Blais was driving, and there being some distance between the teams. The witness Guilman testified that she heard the whistle of the engine, and the witness Heath swore that he could hear the noise of the train coming. From the lay of the land and the curve in the



railroad, the tracks extending towards the Woonsocket depot were visible to one approaching from the east for a much greater distance than were the tracks extending towards Providence, and Blais seemingly paid no attention to the train from Providence, as the witness Heath swore: "I thought by the action that this man [Blais] was watching the down train, [the one approaching on the east track] and the up train [the one approaching in the other direction on the west track] was right on to him." According to the testimony, the east gate was not lowered in time to prevent the deceased from driving on to the tracks, as the descending gate struck on top of the load of hay he was driving, and about in the middle thereof. The testimony further disclosed that, when Blais' horses got on to the first or east track, the gate tender shouted to him in English to stop, and the witness Trottier swore that he hallooed in English to Blais when on the east track to stop, but whether Blais understood he does not know, for Blais was a Frenchman, and spoke no English. Whether, if Blais did understand the meaning of the shouting, he could have stopped and successfully retreated between the descending east gate and the approaching train on the east track, or whether it was wiser to have kept on advancing rather than then to have attempted to retreat, nowhere appears. The gates on both sides of the tracks on this occasion were worked together, and the gate tender lowered the east gate behind Blais and the west gate in front of him, so that he could not pass under the west gate off of the tracks on the west side; hence he was literally entrapped or penned in, for the gates were closed both behind him and before him, the train from Woonsocket was approaching him on the east track on his right hand, and the train from Providence was approaching him on the west track on his left hand. Blais kept on advancing across the tracks, and whether he would have crossed them in safety but for the lowering of the west gate in front of him is a question of fact, which the nonsuit precluded the jury from determining, and which we will now consider.

The testimony discloses that there were four witnesses to the accident sworn, viz. Heath, Guilman, Trottier, and Normandin. But Trottier sheds no light whatever upon the question under consideration. In deed he was not questioned at all in regard to it; and Normandin, whose opportunity for observation was not as

good as that of either Heath or Guilman, thought that Blais had got across safely. Elise Guilman, a French woman, who testified through an interpreter, was standing at the end of and near the crossing gate on the west or Woonsocket side of the tracks when the accident happened and had ample opportunity for observation. The record of her examination on the point in question is as follows: "Question. Did you see the crossing gates lowered across the avenue? Answer. Yes, sir. Q. Where did those gates come down,—those gates which were on the Hamlet side of the road? A. When Mr. Blais was driving his team the gateman lowered that gate on the Hamlet side on the load of hay, and the other one ahead of the horses. Q. Could you see distinctly from where you stood? A. Yes, sir. * * * Q. State whether or not the horses stopped before the train struck the team. A. I saw the horses stop on the gate. The gate stopped them. Q. Which gate,—on which of the railroad? A. On the Woonsocket side. Q. State whether Mr. Blais was going across the tracks rapidly or slowly. A. Not quickly, from what I saw. If the gate wasn't closed, he could save himself easy." Cross-examination: "Q. Did she think the man was getting into a dangerous position by going on the track at the time? A. No; if he didn't close him with the gate, he could save himself easy." Carlos T. Heath also saw the accident from the west or Woonsocket side of the tracks. On this point he swore as follows: "Question. Was your observation of this distinct? Answer. I was close to it. When the car struck him close to the forward wheel, I was right there then. * * *

Q. What prevented the horses and the team, if anything, from going across and avoiding this accident? A. I couldn't say for certain as to that; but I thought at the time of it, if the gate hadn't been let down so quick on the other side, he would have had a good show to get across, but I couldn't say whether he would or not. Q. That is to say, the westerly gate? A. Yes. Q. Did they appear to stop before the train struck him. A. They got there, I should say, about the same time as the train. Perhaps they might have got over if the gates had been up. You put any thing in front of horses in that way, and it will stop the speed. It stops a horse to put anything in front of him. A good many people stop a runaway horse in that way." The state of the testimony, then, is that one witness, Guilman, was

positive that Blais would have got across safely but for the west gate having been closed in front of him, and that another witness, Heath, though not positive, thought that he had a good show to do so. If Blais could have crossed the tracks without injury but for the west gate having been closed in front of him, then it would seem that the immediate cause of the injury was the closing of that gate.

Granting that Blais' own conduct had exposed him to the risk of injury, is the plaintiff, on account of such negligence, necessarily precluded from recovering? We think he is unless this case comes within the rule of the celebrated case of *Davies v. Mann*, 10 Mees. & W. 546, decided in the court of exchequer in 1842. In that case Davies, having fettered the legs of a donkey, negligently allowed him to graze at large upon the highway, and Mann's servant, coming along in a wagon, ran over and killed the donkey, who could not get out of the way. It was conceded that the act of the plaintiff, in leaving the donkey on the highway, so fettered as to prevent his getting out of the way of passing vehicles, was negligent and unlawful; but inasmuch as it appeared that the defendant, by the exercise of ordinary care, might have avoided running over the animal, the plaintiff was held entitled to recover. In *Radley v. Railway Co.*, 1 App. Cas. 754, 758, Lord Penzance, in the house of lords, used this language, and the lord chancellor (Lord Cairns) stated that he concurred "with every word of it," viz: "The law in these cases of negligence is, as was said in the court of exchequer chamber, perfectly well settled, and beyond dispute. The first proposition is a general one to this effect: that the plaintiff in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care which contributed to cause the accident. But there is another proposition equally well established, and it is a qualification upon the first, namely: that though the plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him. This proposition, as one of law cannot be questioned. It was decided in the case of *Davies v. Mann*, 10

Mees. & W. 546, supported in that of Tuff v. Warman, 5 C. B. (N. S.) 573, and other cases, and has been universally applied in cases of this character without question." In Morris v. Railroad Co., 45 Iowa, 29, 32, the plaintiff recovered a verdict of \$8,000, and the case was an appeal from a district court to the supreme court. The plaintiff was a stockman and, having left his prod poles in another place, and wishing to know whether he would have time to get them before the arrival of a certain train which was expected about that time, stepped upon one of some loaded cars to which an engine and another car were about to be attached, to look for the train. While he was standing there, the engine backed the other car against that on which he was standing, and he fell between them. It was claimed by plaintiff that the defendant was guilty of negligence in backing the engine and car with unusual speed, and in not giving him warning, of both which facts there was some evidence. On the other hand defendant claimed that plaintiff was guilty of negligence in standing on the car. It appeared that at the time of the accident the plaintiff was standing with his back to the engine, and near the forward end of the car. It is apparent that it was a dangerous position if other cars were to be backed against it. After stating the facts already given, the learned court said: "We are of the opinion that, taking the evidence altogether we should not be justified in disturbing the verdict. The evidence shows that at the time of the accident one Platt, who was engaged as an employee of the defendant in making up the train, was standing upon a car next to the one upon which the plaintiff was standing, and saw the plaintiff standing in his dangerous position; and, while the plaintiff was so standing, Platt signalled to the engineer with his hands and arms to back the engine, and gave the plaintiff no warning. The plaintiff's negligence will not enable the defendant to escape liability if the act which caused the injury was done by defendant after it discovered the plaintiff's negligence, and if the defendant could have avoided the injury in the exercise of reasonable care. [Cases cited.] As Platt exercised control over the movements of the locomotive, it was incumbent upon him to use reasonable care to avoid doing an injury by such movements; and if, as a reasonable man, seeing the plaintiff's position on the car so near the forward end, with his back to the locomotive, he should have apprehended the accident which resulted from the

movement produced by his signal, his negligence will be considered the approximate cause of the injury." In *Northern Cent. Ry. Co. v. State*, 29 Md. 420, 485, the supreme court of Maryland laid down the law in this wise: "It is doubtless true that if the deceased, by his own negligence or want of ordinary care and caution, so far contributed to his misfortune that, but for such negligence or want of ordinary care and caution on his part, the misfortune and damage complained of would not have occurred, this action could not be sustained; and, if negligence has been mutual in the production of the injury, no action lies, for the reason that, as there can be no apportionment of damages there can be no recovery. Such negligence, however, must have been concurrent, and formed the approximate cause of the injury complained of; for if the negligence of the defendant was the proximate, and that of the deceased the remote, cause of the injury, the action is maintainable, notwithstanding the deceased may not have been entirely without fault. This principle is settled by many well-considered cases. [Citing cases.] The mere negligence or want of ordinary caution on the part of the deceased, as was decided in the case of *Tuff v. Warman*, 5 C. B. (N. S.) 573, would not disentitle the plaintiff to recover, unless it were such that, but for such negligence or want of ordinary caution, the misfortune would not have happened, nor if the defendant might, by the exercise of care on its part, have avoided the consequences of the neglect or carelessness of the deceased." The principle of law laid down in *Davies v. Mann*, not only prevails in England, but largely in the United States, and numerous citations of cases are to be found in the text books. Vide *Shear & R. Neg.*, § 99, and notes; *Patt. Ry. Acc. Law*, 51 et seq., and notes. The explanation of the rule in *Davies v. Mann* given by Patterson (page 55) is especially worthy of note. Says that writer: "The rule in *Davies v. Mann* has been misunderstood and misapplied. It means only that negligence upon the part of the plaintiff which bars his recovery from the defendant must have been a proximate cause of the injury, and that it is not a proximate, but only a remote, cause of the injury when the defendant, notwithstanding the plaintiff's negligence, might, by the exercise of ordinary care and skill, have avoided the doing of the injury. Thus stated, the rule is consistent with the theory upon which the doctrine of contributory negli-

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gence is based, and furnishes no support for that of comparative negligence."

But in the case at bar as in many close cases, the difficulty is not so much in the statement of the rule as in the application of it. We have examined many cases bearing upon the doctrine of proximate and remote causes as it has arisen and been decided in the courts. But in the words of Mr. Justice Miller, in regard to the cases cited before in United States supreme court, in *Insurance Co. v. Tweed*, 7 Wall. 44, 52, "it would be an unprofitable labor to enter into an examination of these cases. If we could deduce from them the best possible expression of the rule, [i. e. as to whether an alleged cause is proximate or remote,] it would remain after all to decide each case largely upon the special facts belonging to it, and often upon the very nicest discriminations. One of the most valuable of the criteria furnished us by these authorities is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened, of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote." In seeking the cause of the injury in the case at bar, therefore, if it is alleged, that Blais' attempting to cross the tracks was the proximate cause it devolves upon us to consider whether there was any testimony tending to show that any new cause had intervened between the fact accomplished and the alleged cause. If Blais' act in crossing the track was, in the eye of the law, the proximate cause of the accident, then his administrator is not entitled to recover. That the accident would not have happened if Blais had not crossed the tracks is beyond question, and so it would not have occurred if he had not been teaming on that day. His crossing the track may have been the "agency," or "medium," or "opportunity," or "occasion," or "situation," or "condition," as it is variously styled, through or by which the accident happened, but may not have been any part of its real and controlling cause; and whether it was or not depends upon circumstances to be drawn from the testimony. If Blais could not have crossed the track in safety even if the west crossing gate had been open, his attempting so to cross would have been the proximate, the real, and controlling cause of the accident; and, though the defendant may have been negligent in leaving the east gate open, the plaintiff could not have recovered

on account of contributory negligence, the negligence of the deceased and of the defendant being contemporaneous, and both causing the accident. If, however, Blais could have crossed the tracks in safety but for the west gate having been lowered in front of his horses, then his being on the track was but a remote cause, and the lowering of that gate was the proximate or real and controlling cause,—the *causa causans*. If the negligence of Blais antedated that of the defendant by any appreciable and well-defined period, no matter how brief the space, so that the gateman, after discovering Blais' negligence, could by the exercise of ordinary care have prevented the accident, it was incumbent on the gateman to have exercised it, and not to have done so was such negligence as to render the defendant liable. An important question, therefore, is, did the gateman exercise ordinary care in lowering the west gate in front of Blais' horses? The term "ordinary care" is a difficult one to define, as it is relative, and always dependent on relationship and circumstances. In some relations a slight want of care is a want of ordinary care because of the high duty that is owing; in other relations only a great failure of care is a want of ordinary care, because there is only a duty of imperfect obligation owing; while in still other relations only a degree of care between the two extremes would constitute ordinary care. Therefore, where the circumstances require great care, then great care is only ordinary care; when they require only slight care, then only slight care becomes ordinary care; and so on between the two extremes on the same principle, according to the circumstances of each case. The test of ordinary care is thus laid down in 16 Amer. & Eng. Enc. Law, 402: "When a person, in the observance or performance of a duty due to another, has neither done nor omitted to do anything which an ordinarily careful and prudent person, in the same relation and under the same conditions and circumstances, would not have done or omitted to do, he has not failed to use ordinary care, and is therefore not guilty of negligence, even though damage may have resulted from his action or want of action; and conversely, there has been a want of ordinary care when a person in the observance or performance of a legal duty to another, has done or omitted to do something which an ordinarily careful and prudent person, in the same relation and under similar circumstances and conditions, would not have done or omitted,

such act or omission being the proximate cause of injury to the other party to the relation." As the defendant is responsible for the act of the gateman, let us now apply the test of ordinary care just given to his act in closing the west gate in front of Blais' horses. It was the duty of the gateman to close the gates at a proper time for the protection of passers-by, and to keep such persons from going on to the track. In this case, if the witness Guilman is to be believed, he shut the east gate when it would do Blais no good and shut the west one when it would do him only infinite harm; in other words the gateman converted what was intended as a safeguard into an instrumentality of danger and death. Certainly whatever the gateman's duty to Blais was as to attempting to close the east gate, it was imperatively incumbent upon him not to close the west gate, so as to imperil Blais' safety; and, if there was any reason why one gate could not have been raised or lowered without the other, then the gateman should have ceased lowering the gates when he found Blais was advancing under the east gate, and, if necessary, have raised them, so that Blais might have passed off the tracks on the west side, and nothing was apparent in the testimony to indicate any difficulty in doing so.

In our opinion, the case at bar, as it now presents itself, turns upon the question whether the gateman's lowering the west gate in front of Blais' horses was what prevented Blais, as a matter of fact, from crossing the tracks in safety, and, if so, whether there were any excusing circumstances that relieve such gateman's act from being negligence for which the defendant would be liable. If there was time for Blais to have safely crossed but for the closing of the west gate, and there were no excusing circumstances in the gateman's conduct, then the defendant would be liable; otherwise, it would not be liable. As the witness Guilman's testimony is positive that Blais was stopped by the gate, which is reinforced somewhat, by the witness Heath, and perhaps, to a certain extent, by the witness Normandin, there certainly was a question of fact that should have been passed upon by the jury, which the nonsuit precluded. In *Clark v. Lighting Co.*, 16 R. L. 463, 465; 17 Atl. Rep. 59, Chief Justice Durfee, in delivering the opinion of the court said: "Generally the question of negligence is a question of fact to be determined by the jury; but sometimes, when there is no controversy as to the facts, and when it clearly appears from

them what course a person of ordinary prudence would pursue, it is a question for the court. So, when the standard of duty is fixed, or when the negligence is clearly defined and palpable, the court will not leave the case to the jury. But cases of this kind are few, and are generally cases in which the situation is so simple that any person of ordinary prudence would instantly perceive what to do or what to refrain from doing. * * * But where the facts are complicated or extraordinary, the case is usually left, and properly left, to the jury. So, whether the facts be disputed or not, if they are such that different minds, fairly considering them, might draw different conclusions from them, the question of negligence is for the jury. 2 Thomp. Neg. 1286; *Boss v. Railroad Co.*, 15 R. L 149, 154; 1 Atl. Rep. 9." We think the testimony should have been allowed to be passed upon by the jury, under proper instructions as to contributory negligence and the qualifications thereto. Petition granted.*

1. Railroad companies. Accident at crossing. When gates should be of sufficient strength to ward off restless horses. In an action against a railroad company for the death of plaintiff's intestate it appeared that at the place where he was killed defendant's and another road crossed a street within a few feet of each other; that deceased was riding on an ice-cart; that the driver thereof had no warning of an approaching train until he was on the tracks of the other road; that he was ordered by the gateman of the other road not to back his team; that defendant's gates were shut down before him, and he could not go on; that the horses became unmanageable, and broke through defendant's gates, which were merely narrow strips of boards, and were struck by an engine of defendant's approaching at the rate of 20 miles per hour. *Held*, that the question of defendant's negligence was for the jury. *Marks v. Fitchburg R. Co.*, 155 Mass. 498; 29 N. E. Rep. 1148. The court says: "If in the proper management of defendant's business at the crossing, persons driving in the exercise of due care are likely to find themselves shut in between the defendant's tracks and the tracks of the Boston & Maine Railroad when trains are passing, it is a question for the jury whether the defendant should not, for the protection of travelers, have a different kind of gate, to keep frightened horses from pushing upon the tracks."

2. Negligence in management of gates. Contributory negligence of plaintiff. In an action against a railroad company for personal injuries, it appeared that, while attempting to drive across defendant's track at a street crossing, plaintiff was struck by a train going west, the approach of which was obscured by a train going east. Plaintiff had been waiting to cross while the east-bound was passing, and, seeing the gate go up, attempted to cross, but was shut in on the track by the lowering of the gate on the opposite side.

* Reported in 27 Atl. 450.

There was evidence that a mound of rocks 15 or 20 feet high stood by the track, obstructing plaintiff's view of the approaching train, and that it was dark when the accident occurred. The gates were operated by servants of the defendant. *Held*, that the defendant was guilty of negligence and that the question of contributory negligence was for the jury.

3. Lowering gates so as to strike and frighten horse. Breaking of rein, and upsetting of vehicle. Proximate cause. In an action against a railroad company for injuries received, while plaintiff was crossing defendant's track, from the breaking of a rein, whereby the horse with which she was driving became unmanageable and upset the wagon, where there is evidence that the gate at the crossing struck the horse as the watchman was lowering it, and that the rein broke while the driver was trying to control the horse after the blow, the breaking of the rein and the negligence of the company are both proximate causes of the accident and it is not error to refuse to charge that if the proximate cause of plaintiff's injury was the breaking of a defective rein she is not entitled to recover, since the breaking of the rein is not the sole proximate cause. *Phillip, v. New York Central & H. R. R. Co.*, 127 N. Y. 657; 27 N. E. Rep. 978.

PORTLAND NATURAL GAS AND OIL CO. v. STATE ex rel. KEEN.

(Supreme Court of Indiana, September 26, 1893.)

1. NATURAL GAS COMPANIES. DUTY TO FURNISH GAS. MANDAMUS. A natural gas company, occupying the streets of a town or city with its mains, owes to the owners and occupants of houses abutting on such streets the duty of furnishing them with such gas as they may require, where they make the necessary arrangements to receive it, and comply with the regulations of the company; and, on its refusal or neglect to perform such duty, it may be compelled to do so by writ of mandamus.

2. To entitle the owner of such a house to the right of being supplied with natural gas, it is not necessary that he should own an interest in the company, different from that held by other citizens.

3. DEFENSE. EFFECT OF RELATOR ALREADY HAVING A CONNECTION WITH PIPES OF ANOTHER COMPANY. In mandamus to compel a natural gas company to furnish relator's house with gas, an allegation in the answer that relator is already being provided with natural gas by another company is not sufficient to show that it will be necessary for defendant, in order to supply relator's house, to violate Acts 1891, p. 382, § 1, which makes it unlawful for any one to change, alter, or extend any service or other pipe or attachment owned by a gas company without the latter's consent.

MANDAMUS by the state of Indiana, ex rel. William W. Keen against the Portland Natural Gas & Oil Company to compel defendant to supply relator's home with natural gas. From a judgment in relator's favor, defendant appeals.

J. W. Headington, J. F. La Follette, and D. T. Taylor, for appellant. John M. Smith, for appellee.

CORREY, J.—This was an action by the appellee against the appellant to compel the latter by mandamus, to supply the residence of the relator with natural gas to be used as lights and fuel. It appears from the complaint that the appellant is a corporation duly organized under the laws of this state for the purpose, among others, of supplying to those within its reach, natural gas to be used for lights and fuel. By permission of the common council it has laid its pipes for that purpose in the streets and alleys of the city of Portland, in this state, and has pipes laid in Walnut street, of that city. The relator resides on Walnut street, on the line of one of the appellant's main pipes. His house is properly and safely plumbed for the purpose of obtaining natural gas. In May, 1890, the relator demanded of the appellant gas service, and tendered to it the usual and proper charges for such service; but it refused by its officers, to furnish the gas demanded, whereupon this suit was brought to compel it to furnish the gas desired by the relator. The court overruled a demurrer to the complaint. It also sustained a demurrer to the second, third, and fourth paragraphs of the answer filed by the appellant. Over a motion for a new trial, the court awarded a peremptory writ against the appellant, requiring it to furnish the relator with gas, as prayed in the complaint. These several rulings are assigned as error. Very many of the objections urged against the complaint go to the question of its uncertainty, and are technical in character. It has been so often decided that a demurrer is not the remedy for uncertainty that we need not cite authority upon the subject. The vital question in the case relates to the right of the relator to compel the appellant, by mandamus, to supply his dwelling house with natural gas for lights and fuel. There are cases which hold that, in the absence of a contract, express or implied, and where the charter of the company contains no provision upon the subject, a gas company is under no more obligation to continue to supply its customers than the vendor of other merchandise,—among which is the case of *Com. v. Lowell Gaslight Co.*, 12 Allen, 75. But we think that the better reason, as well as the weight of author-

ity, is against this holding. Mr. Beach, in his work on Private Corporations, (volume 2, § 835) says: "Gas companies, being engaged in a business of a public character, are charged with the performance of public duties. Their use of the streets, whose fee is held by the municipal corporation in trust for the benefit of the public, has been likened to the exercise of the power of eminent domain. Accordingly, a gas company is bound to supply gas to premises with which its pipes are connected." Mr. Cook, in his work on Stock and Stockholders and Corporation Law (section 674), says: "Gas companies, also, are somewhat public in their nature, and owe a duty to supply gas to all." To the same effect are the following adjudicated cases: *State v. Columbus Gaslight & Coke Co.*, 34 Ohio St. 572; *New Orleans Gaslight Co. v. Louisiana Light & Heat Producing, etc., Co.*, 115 U. S. 650; 6 Sup. Ct. Rep. 252; *People v. Manhattan Gaslight Co.*, 45 Barb. 136; *Gibbs v. Gas Co.*, 130 U. S. 396; 9 Sup. Ct. Rep. 553; *Williams v. Gas Co.*, 52 Mich. 499; 18 N. W. Rep. 236; *Gas Light Co. v. Richardson*, 63 Barb. 437. Our general assembly, recognizing the fact that natural gas companies were, in a sense, public corporations, conferred upon them the right of eminent domain by an act approved February 20, 1889 (Acts 1889, p. 22). It has often been held that mandamus is the proper proceeding by which to compel a gas company to furnish gas to those entitled to receive it. 8 Amer. & Eng. Enc. Law, pp. 1284-1289; *People v. Manhattan Gaslight Co.*, *supra*; *Williams v. Gas Co.*, *supra*; *Gaslight Co. v. Richardson*, *supra*. In view of these authorities, we are constrained to hold that a natural gas company, occupying the streets of a town or city with its mains, owes it as a duty to furnish those who own or occupy the houses abutting on such street, where such owners or occupiers make the necessary arrangements to receive it, and comply with the reasonable regulations of such company, such gas as they may require, and that, where it refuses or neglects to perform such duty, it may be compelled to do so by writ of mandamus. As to the sufficiency of an answer averring that the company had not a sufficient supply to furnish all those demanding gas, we intimate no opinion, as no such defense was interposed in this case. It follows that the complaint in this case states a cause of action against the appellant, and that the court did not err in overruling the demurrer thereto.

The second paragraph of the answer avers that at the time of the demand for gas alleged in the complaint, the relator was being furnished with natural gas by the Citizens' Natural Gas & Oil Mining Company of Portland, Ind., and that said company has ever since continued to furnish him with gas for fuel and lights, and is ready and willing to continue doing so, so long as he may pay for the same. The third paragraph avers that the relator has no interest in the appellant, except what he may have and hold, under the laws of the state, in common with all other citizens of the city of Portland as shown by the allegations in the complaint. The fourth paragraph avers that the demand which the relator alleges he made on the appellant to furnish him natural gas is couched in general terms merely, and is not express and distinct and does not clearly designate the precise thing which is required, but is vague, indefinite, and uncertain, as shown by the facts alleged in the complaint.

It is contended by the appellant, in support of the second paragraph of its answer, that, in view of the facts herein averred, it could not comply with the demand of the relator without a violation of the provisions of an act of the general assembly approved March 9, 1891 (Acts 1891, p. 381).^{*} It would seem to be a sufficient answer to this contention to say that it does not appear by any averment in this answer that it was necessary to change, extend, or alter any service or other pipe, or attachment belonging to the Citizens' Natural Gas & Oil Mining Company in order to supply the relator with the gas he demanded. For anything appearing from this answer, the gas required by relator from the appellant could have been furnished without interfering with that company. But, if it appeared otherwise, we would not be disposed to place a construction upon that act which would give a gas company furnishing unsatisfactory service, or charging an unsatisfactory price for its service, the perpetual right to furnish gas to a particular building because it had been permitted to attach its

^{*}This statute makes it unlawful for any person, in any manner whatever, to change, extend, or alter, or cause to be changed, extended, or altered, any service or other pipe, or attachment of any kind, connecting, or through which natural or artificial gas is furnished from, the gas mains or pipes of any person, company, or corporation, without first procuring from said person, company, or corporation written permission to make such change, extension, or alteration.

appliances for the purpose of furnishing gas. In our opinion, the court did not err in sustaining a demurrer to this answer.

The third paragraph of the answer was wholly insufficient to bar the relator's cause of action. It was not necessary that he should own an interest in the appellant different from that held by the other citizens of the city of Portland. It was sufficient that the appellant owed him a duty, in common with other citizens, to furnish him gas, which duty it had refused to perform.

The fourth paragraph of the answer states no issuable fact, and is clearly bad.

The evidence in the cause tends to support the finding of the circuit court, and we cannot, for that reason, disturb the finding on the evidence. There is no error in the record for which the judgment of the circuit court should be reversed. Judgment affirmed.*

COMPANIES ENGAGED IN A PUBLIC SERVICE MUST SERVE THE PUBLIC WITH IMPARTIALITY.

1. Gas Companies.—The business of supplying gas for illumination or heating in a city or town, as ordinarily carried on, is undoubtedly "affected with a public interest." "The manufacture and distribution of illuminating gas by means of pipes or conduits, placed, under legislative authority, in the streets of a town or city is a business of a public character; it is the exercise of a franchise belonging to the state; the services rendered and to be rendered for such grant, are of a public nature. When the right to make and sell gas to the city and its habitants, under the conditions here named, is conferred upon a company, it is so conferred as well for the benefit of the public as of the company." *Chicago Gas Light Co. v. Peoples' Gas Light Co.*, 121 Ill. 530, 539, (1887.) "It is a business of a public nature and meets a public necessity, for which the state may make provision. It is one which, so far from affecting the public injuriously, has become one of the most important agencies of civilization, for the promotion of the public convenience and the public safety." *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650. Similar views are expressed in *Louisville Gas Co. v. Citizens Gas Co.*, 115 U. S. 683; *Gibbs v. Baltimore Gas Co.*, 130 U. S. 396; *City of St. Louis v. St. Louis Gas Light Co.*, 70 Mo. 69; also in many of the cases hereafter cited.

One of the earliest cases in which the duties of such a company were considered is that of *Shepard v. Milwaukee Gas Light Co.*, 6 Wis. 539, (1857). The plaintiff sued for damages for a refusal of the defendant to supply him with gas. The questions considered were whether the defendant was bound to supply gas to any who demanded it and what terms and conditions it might impose. The company was chartered for the purpose of supplying the city of Milwaukee and its inhabitants with gas but it was not expressly required to furnish gas to any one. The court, however, held that it was under

*Reported in 34 N. E. Rep. 818.

obligation to do so upon reasonable terms and conditions and proceed to pass upon the reasonableness of certain regulations of the company. The court says:

"The very fact of this exclusive right conferred upon the company to manufacture and sell gas in the city, to be consumed therein by the citizens thereof, would imply an obligation on the part of the company to furnish the city and citizens with a reasonable supply on reasonable terms, and when the nature and objects of the corporation are considered, viz: the exclusive right to manufacture and sell gas, *for the purpose of lighting the city of Milwaukee, and the dwellings and business places of its inhabitants*, how can it be urged that this is a mere private corporation for the manufacture and sale of a commercial commodity. The very term is incompatible with the idea of trade and commerce. It is not in its nature interchangeable, but merely consumable, and consumable only at the place of delivery in the immediate vicinity of its production. If a company were chartered with the exclusive privilege of manufacturing and selling bread in the city of Milwaukee, would it be contended that the company were under no obligations to supply or sell bread to any but such person or persons as the company should capriciously select? Odious as were monopolies to the common law, they are still more repugnant to the genius and spirit of our republican institutions, and are only to be tolerated on the occasion of great public convenience or necessity: and they always imply a corresponding duty to the public to meet the convenience or necessity which tolerates their existence. The successful operation of this gas company, worked a radical change in the mode of lighting the streets, dwellings and places of business in the city, and created thereby a sort of necessity for the article, to produce which, the exclusive privilege was conferred upon them, and hence they assumed the correlative duty of supplying this necessity. We think there can be no doubt, that the company were bound to furnish the gas to the plaintiff, upon his complying with such reasonable conditions or terms as they might rightfully impose."

Williams v. Mutual Gas Co., 52 Mich. 499, (1884), is a similar case. The plaintiff kept a hotel and was using about \$60 worth of gas per week. The defendant shut off the supply because the plaintiff refused to sign a certain contract and keep on deposit with the company, as security, the sum of \$100. The plaintiff sued for damages and recovered. The court held the requirement of the deposit to be reasonable, but held certain provisions of the contract unreasonable. The court says: "The defendant is a corporation in the enjoyment of certain rights and privileges, under the statutes of the state and charter and by-laws of the city, and derived therefrom. These rights and privileges were granted that corresponding duties and benefits might inure to the citizens when the rights and privileges conferred should be exercised. The benefits are the compensation for the rights conferred and privileges granted, and are more in the nature of convenience than necessity, and the duty imposed on this corporation cannot therefore be likened to that of the inn-keeper or common carrier, but more nearly approximates that of the telegraph, telephone or mill owner. * * * The nature of the article made, the objects of the company, its relations to the community, and the rights and privileges it must necessarily exercise, give the

company a public character, and, to a certain extent, a monopoly which can never be tolerated, only upon the ground of some corresponding duty to meet the public want. Such duty rests upon the defendant, and I think it requires the company to furnish to this plaintiff, at the Biddle House, the supply of gas demanded, under reasonable rules and regulations, but among all such as might be mentioned, it is with the defendant to adopt and rely upon such as it may select."

Similar decisions have been made in the following cases: *New Orleans Gas Light Co. v. Paulding*, 12 Rob. La. 378, 380, (1845); *Gas Light Co. v. Colliday*, 25 Md. 1, (1866); *People v. Manhattan Gas Light Co.*, 45 Barb. 136, (1865); *Lloyd v. Gas Light Co.*, 1 Mackey, 331; *City of Rushville v. Rushville Natural Gas Co.*, 182 Ind. 575; 28 N. E. Rep. 858; *Portland Natural Gas & Oil Co. v. State*, ante p. 640; *Fleming v. Montgomery Light Co.*, (Ala.), 13 So. Rep. 618; *Commercial Bank v. London Gas Co.*, 20 U. C. Q. B. 233, (1860). The same views are also indirectly supported by the following authorities: *Chicago Gas Light Co. v. Peoples' Gas Light Co.*, 121 Ill. 530, (1887); *Olmstead v. Morris Aqueduct Co.*, 47 N. J. L. 311, (1885); *State v. Gas Co.*, 34 Ohio St., 572, (1878); *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650; *Louisville Gas Co. v. Citizens Gas Co.* 115 U. S. 633; *Gibbs v. Baltimore Gas Co.*, 130 U. S. 396.

Some of these cases are affected by statutes and some lay stress upon the fact that the company in question had an exclusive right to supply gas, but most of them are decided on common law grounds, and, altogether, they firmly establish the rule that a corporation organized for the purpose or which undertakes to make and distribute gas for public and private use, whether it has an exclusive right or not, is bound to serve the public with impartiality and upon reasonable terms and conditions.

A contrary doctrine is held in *McCune v. Norwich City and Gas Co.*, 30 Conn. 521, (1862); *Hoddesdon Gas and Coke Co. v. Haselwood*, 6 C. B. U. S. 239; 95 E. C. L. R. 239; and *Paterson Gas Light Co. v. Brady*, 27 N. J. L. 245, (1858); and see *Commonwealth v. Lowell Gas Light Co.*, 12 Allen, 75. *Paterson Gas Light Co. v. Brady*, 27 N. J. L. 245 was held by the court of errors and appeals in *Olmstead v. Morris Aqueduct*, 47 N. J. L. 311, to have been erroneously decided. The question was only incidentally involved in the Massachusetts case, so that the Connecticut case is the only direct authority in this country holding that a gas company, in the absence of any statute to the contrary, can exercise its pleasure as to furnishing gas to particular individuals.

2. Gas companies not bound to supply gas to one who desires to use it only in case of accident to electric light supplied by another company.—In *Fleming v. Montgomery Light Co.* (Ala.), 13 So. Rep. 618, it is held that a gas company which has been granted the exclusive privilege of supplying gas in a city for a certain number of years, under an agreement that at all times it would supply the citizens for private use with a sufficient quantity of gas, need not leave a gas meter in the house of a citizen who is using electric light, furnished by another company, so that in case of accident to the electric light he may use the gas.

As the question is a novel one and the opinion brief, we quote it entire. "COLEMAN, J.—Appellant, as complainant, filed the present bill for the pur-

power of enjoining the respondent, the Montgomery Light Company, from removing its gas meter from the premises of complainant, and to enjoin the respondent "from refusing to furnish your orator gas." Complainant's rights are very clearly set forth in the bill, and grow out of an agreement entered into in the year 1852 between the city of Montgomery and the John Jeffrey Company, by the terms of which the exclusive right and privilege of manufacturing and supplying gas for a period of 50 years for the city of Montgomery and its inhabitants was granted to the John Jeffrey Company, the said company agreeing on its part "at all times to supply the inhabitants of the city of Montgomery for private use with a sufficient quantity of gas of the most approved quality." The Montgomery Light Company has succeeded to all the privileges and assumed all the obligations of the John Jeffrey Company; and the bill makes the further averment "that it is the duty of the respondent, under its charter, to supply all applicants with gas and electric lights, one or both, at the option of the consumer." There is nothing in the agreement by which the light company may compel the inhabitants of the city or any one of them, to use its gas and electric lights. Stripped of the statement of facts necessary to present the complainant's case in an intelligible form, the one question raised is whether the assumption to supply the inhabitants of the city of Montgomery with gas imposes the legal duty on the company to furnish gas meters and keep on hand a sufficient quantity of gas for inhabitants who do not use or consume gas, but who desire to be supplied 'with meters and connections with the defendant's gas pipes, so that, in case an accident, which is apt to occur' should happen, they could use the gas.' A statement of the proposition suggests its answer. There can be no difference in principle between the case stated and the one in the bill, in which it is shown that at one time complainant used gas for lights, but at the time of filing of the bill, and previous thereto, complainant used in his building electric lights, furnished by a different company or corporation, and was not a patron of defendant company, and the injunction was to make provision "to use gas" "in case an accident should happen to the electric light in use by orator." Plaintiff's contention is that, although he has made other arrangements with a different company, yet it is the duty of respondent to keep on hand gas and electricity, with proper meters and connections and electric burners, "in case of an accident" to the company, which has contracted to supply him, and that, too, without any corresponding obligation on his part to use the gas of the defendant. We can find no such provision in the contract between the city and respondent, expressed or implied. There is no equality or equity in such a proposition. It is hardly necessary to cite authorities, but we refer to the following: *Williams v. Gas Co.*, 52 Mich. 499; 18 N. W. Rep. 286. There is no error in the record."

There was no analogous question decided in *Williams v. Gas Co.*, 53 Mich. 499 as will appear from the statement of the case given in the last section. The following language in the opinion of the court tends, however, to some extent, to support the Alabama case: "The duty of the company towards the citizen, and that of the citizen towards the company, is somewhat reciprocal, and any rule or regulation or course of dealing between the parties which does not secure the just rights of both ought not to be adopted, and cannot

receive the sanction of the courts. When the defendant company made the connection of its service pipes and mains with the pipes and fixtures of the Biddle House, it imposed upon itself the duty to supply the house and premises upon reasonable terms and conditions with such amount of gas as the owner or proprietor might require for its use, and pay for the same, so long as the company should exist and do business " p. 503.

3. Water supply companies. Corporations organized for the purpose of supplying the inhabitants of cities and towns with water, owe the same obligations to the public as gas companies, and are bound to be impartial and reasonable in their dealings with the public. *Haugen v. Albina Light & Water Co.*, (Or.), 5 Am. R.R. & Corp. Rep. 464; *McCrary v. Beaudray*, 87 Cal. 120; *Lumbard v. Stearns*, 4 Cush. 60; *Olmstead v. Morris Aqueduct*, 47 N. J. L. 311. The rates charged by such companies for water must be reasonable and are subject to regulation by the legislature. *Same and Spring Valley Water Works v. San Francisco*, 1 Am. R.R. & Corp. Rep. 96; *Spring Valley Water Works v. Schottler*, 110 U. S. 347; *New Orleans Water Works Co. v. Rivers*, 115 U. S. 674.

4. Irrigation companies. The same principles have been held to apply to irrigation companies in California. In *Price v. Riverside L. & I. Co.*, 56 Cal. 431, a mandamus was granted to compel the defendant to furnish the plaintiff water for irrigation, though there was no express requirement in the statute to that effect. The court held that every corporation deriving its being from the irrigation act "has impressed upon it a public trust—the duty of furnishing water, if water it has, to all those who come within the class or community for whose alleged benefit it has been created."

5. Telegraph and telephone companies. It is now well settled that telegraph and telephone companies are a public agency, that they are subject to legislative regulation in their charges and service, and that they are under a common law obligation to treat the public with impartiality and to afford their service upon reasonable terms and conditions. *Central Union Telephone Co. v. State*, 123 Ind. 113, (1890); 2 Am. R.R. & Corp. Rep. 406; *Central Union Telephone Co. v. State*, 118 Ind. 194, (1888); *Hockett v. State*, 105 Ind. 250, (1885); *Central Union Telephone Co. v. Bradbury*, 106 Ind. 1; *Johnson v. State*, 113 Ind. 143; *Louisville Transfer Co. v. Am. District Telephone Co.*, (Louisville Circ. Ct.), 1 Ky. L. J. 144; 24 Alb. L. J. 283, (1881); *Chesapeake & R. Tel. Co. v. B. & O. Tel. Co.*, 66 Md. 399, (1886); *State ex. rel. Am. Union Tel. Co. v. Bell Telephone Co.*, (St. Louis circ. ct.), 22 Alb L. J. 363, (1880); *State v. Nebraska Telephone Co.*, 17 Neb. 126, (1885); *Friedman v. Gold & Stock Tel. Co.*, 32 Hun, 4, (1884); *Smith v. Gold & Stock Tel. Co.*, 42 Hun, 454, (1886); *People ex rel. Postal Tel. Cable Co. v. Hudson River Tel. Co.*, 19 Abb. N. C. 466, (1887); *State v. Telephone Co.*, 36 Ohio St. 296, (1880); *Central District & P. Tel. Co. v. Commonwealth*, 114 Penn. St. 592, (1886); *Bell Telephone Co. v. Commonwealth ex rel. B. & O. Tel. Co.*, (Penn.), 7 Eastern Rep. 672, (1886); *Commercial Union Tel. Co. v. New England Telephone & Tel. Co.*, 61 Vt. 241, (1888); *State ex rel. Postal Tel. Cable Co. v. Delaware &c., Telephone Co.*, 47 Fed. Rep. 633, (1891); *S. C. on appeal*, 50 Fed. Rep. 677, 2 C. C. A. 1, (1892); *Bryant v. W. U. T. Co.*, 17 Fed. Rep., 825, (1883); *Am. Union Tel. Co. v. Union Pac. R. C.*, 1 McCrary, 188, (1880).

All of these cases are of recent date. All of them, more or less directly, and to a greater or less extent support the proposition above stated. In one of the earliest of the cases in which the defendant, a telephone company, refused to supply the relator with a telephone, and which was decided upon common law principles, the court says: "While it is true, as claimed by respondent, that it has been organized under the general corporation laws of the state, and in some matters has no higher or greater right than an ordinary corporation, yet it is also true that it has assumed to act in a capacity which is to a great extent public; and has, in the large territory covered by it, undertaken to satisfy a public want or necessity. * * * It is also true that the respondent is not possessed of any special privileges under the statutes of this state, and that it is not under quite so heavy obligations, legally, to the public as it would be, had it been favored in that way, but we fail to see just how that fact relieves it. While there is no law giving it a monopoly of the business in the territory covered by its wires, yet it must be apparent to all that the mere fact of this territory being covered by the "plant" of respondent, from the very nature and character of its business gives it a monopoly of the business which it transacts. No two companies will try to cover this same territory. The demands of commerce of the present day makes the telephone a necessity. All the people upon complying with the reasonable rules and demands of the owners of the commodity—patented as it is—should have the benefits of this new commerce. * * * The views herein expressed are not new. Similar questions have arisen in and have been frequently discussed and decided by the courts, and no statute has been deemed necessary to aid the courts in holding that when a person or company undertakes to supply a demand which is affected with a public interest, it must supply all alike, who are alike situated, and not discriminate in favor of nor against any." *State v. Nebraska Telephone Co.*, 17 Neb. 126.

In *Friedman v. Gold and Stock Tel. Co.*, 82 Hun, 4 (1884), the defendant was organized for the purpose of gathering and transmitting to its subscribers stock quotations and certain general news which it did by means of stock reporting instruments and news reporting instruments, placed in the offices of its subscribers and connected with its wires. The plaintiffs were stockbrokers and had enjoyed the benefit of the service under a contract which was about to expire. The defendant had threatened to remove the instruments, and to deny the plaintiffs the service. Plaintiffs filed a bill to enjoin such removal with proper averments to show the merits of the case. On demurrer the bill was held good by the general term of the supreme court which says: "For the purpose of applying to a profitable use certain instruments owned by it, the defendant has applied its lines to these instruments whenever required by persons who desire to use the instruments and has entered upon the business of collecting a certain class of news and transmitting it over its wires to the individuals using the instruments. The defendant still remains a public corporation, owing the duty impartially to grant the right to all who comply with its rules to have the privileges furnished. That there is no objection appears from the complaint. The plaintiffs have the instruments and pay, and are willing to pay, the price agreed upon or which shall be established.

The defendant has no right arbitrarily to take away the instruments by force without default. * * * Upon principles of justice a public corporation should make no distinction in respect to persons who wish to partake of the privileges which it was created to furnish." The same principles were approved in a similar case against the same defendant in *Smith v. Gold and Stock Tel. Co.*, 42 Hun, 454 (1886).

The fact that a telephone company is engaged also in some other line of business, such as a messenger service or coupe business, will not justify it in refusing a telephone service to its competitors in the latter business. *Louisville Transfer Co. v. Am. Dist. Tel. Co.*, (Louisville Ch. Ct.), 1 Ky. L. J., 144; 24 Abb. L. J., 283 (1881), *People ex rel. Postal Tel. Cable Co. v. Hudson Riv. Tel. Co.*, 19 Abb. N. C., 466 (1887). In the former of these cases the court says: "Upon the facts appearing upon the petition and affidavits of plaintiff, it is the opinion of the court that defendant is engaged in two distinct employments—one in operating a telephone exchange, and the other in operating a carriage or coupe service. Plaintiff and defendant are not rivals in the former business, and as to that part of defendant's business, it occupies the same position toward plaintiff as it does toward the rest of the public; that defendant is a quasi public servant, and as such is bound to serve the general public, including plaintiff, on reasonable terms, with impartiality; that defendant is governed by the principle of the law of common carriers."

A number of the cases cited grew out of an attempt of the owner of the telephone patents to restrict the use of the patents in such manner as to give the Western Union Telegraph Company the exclusive right and privilege of receiving and transmitting telegraphic messages by the telephone. It appears that on the 10th of November, 1879, the Western Union Telegraph Company and the National Bell Telephone Company, which had been up to that time owners of rival telephone patents, and engaged in litigation concerning them, compromised their differences by a contract, by virtue of which the National Bell Telephone Company became the owner of all the telephone patents which had been in dispute, and thus secured a monopoly of the business. One of the conditions of the compromise was that the Western Union Telegraph Company should have the sole and exclusive license for the term of seventeen years to use the telephone in the receiving and transmitting of telegraphic messages. The rights of the National Company became vested in the American Bell Telephone Company. In licensing local companies, the American Bell Telephone Company forbid such licensees to supply a telephone instrument to any telegraph company, to be used for telegraphic purposes, without the licensor's consent. This consent was then given as to the Western Union Telegraph Company and denied as to all other companies. In every case but one it has been held that this restriction was void and that the local company was bound to furnish all telegraph companies with telephone service, the same as it did the Western Union Company. *State v. Telephone Co.*, 36 Ohio St. 296, (1880); *State ex rel. Am. Union Telegraph Co. v. Bell Telephone Co.*, (St. Louis Circ. Ct.), 23 Alb. L. J. 363, (1881); *State ex rel. B. & O. Tel. Co. v. Bell Telephone Co.*, 24 Am. L. Reg. 573, (1885); *Bell Telephone Co., of Philadelphia, v. Commonwealth ex rel. B. & O. Tel. Co.*, (Pa. Supreme Ct.), 7 Eastern Rep. 672, (1886); *Chesapeake & P. Tel. Co. v. B. &*

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O Tel. Co., 66 Md. 399, (1886); Commercial Union Telegraph Co. v. New England Telephone and Telegraph Co., 61 Vt. 241, (1888); State ex rel. Postal Tel. Cable Co. v. Del. & A. Telegraph and Telephone Co., 47 Fed. Rep. 633, (1891); S. C. on appeal, 50 Fed. Rep. 677, (1893).

The sole exception to these authorities is American Rapid Tel. Co. v. Connecticut Telephone Co., 49 Conn. 352, (1881). The court while apparently recognizing the general duty of such companies to be impartial, says: "But the property of the American Bell Telephone Company in its patents is absolute and exclusive; it can rent or sell it in whole or in part; it can refuse to make or use, or allow any one else to make or use, the telephone described in it; or it can make and sell one and no more, and put such restrictions as it pleases upon the time, place and manner of using that; and it was the privilege of the Connecticut Telephone Company to purchase from it even the most limited right to use one or more of its instruments, and it is not in the power of the court either to enlarge or diminish the purchase."

The decision and doctrine of the Connecticut case have, so far, been uniformly disapproved. The opposite view is well put in the Vermont case as follows: "Patents are property, and the right to sell or lease them, is subject to the same restrictions as other property. The patentee cannot lease them for any use that contravenes principles of public policy. If he leases them for a public rather than for an individual use, he thereby gives the use to the whole public. In this case the American Bell Telephone Company might have licensed its patent to the defendant so the latter alone could have used it, but when it went beyond this, and licensed the defendant to use it for the public it in fact licensed it for all who desired its use and offered compliance with reasonable conditions. The license, with the restriction clause therein, cannot be regarded as the measure of the defendant's duty to the public. On grounds of public policy, which controls all public carriers, that clause in the contract in question is held void, so that the license stands precisely as if the restrictive clause were not contained in it." Commercial Union Tel. Co. v. New England Telephone & Telegraph Co., 61 Vt. 241, (1888).

The telegraph is generally held to include the telephone, and statutes relating to the organization and regulation of telegraph companies are held to apply to telephone companies also. Wisconsin Telephone Co. v. Oshkosh, 62 Wis. 32; 21 N. W. Rep. 828; Roberts v. Wisconsin Tel. Co., 77 Wis. 589; 46 N. W. Rep. 800; Chesapeake & P. Tel. Co. v. B. & O. Tel. Co., 66 Md. 399; Cumberland Telephone Co. v. United Electric R. Co., 42 Fed. Rep. 273.

In Bryant v. Western Union Tel. Co., 17 Fed. Rep. 825, it is held that a telegraph company is not obliged to supply a "bucket shop" with market quotations. In Metropolitan Grain & Stock Exchange v. Chicago Board of Trade, 15 Fed. Rep. 847, it is held that the Chicago Board of Trade may exclude from its floors the agents of a telegraph company who seek to obtain market news to be disseminated and sold.

In most of the cases referred to telegraph and telephone companies are likened to common carriers, and are held to be under similar obligations as respects discrimination. "It is no longer open to question," says the court in Delaware & A. Tel. & Tel. Co. v. State, 50 Fed. Rep. 677, 678, "that telephone and telegraph companies are subject to the rules governing common carriers

and others engaged in like public employment. This has been so frequently decided that the point must be regarded as settled. While it has not been directly before the supreme court of the United States, cases in which it has been so determined are cited approvingly by that court in *Budd v. New York*, 143 U. S. 517; 12 Sup. Ct. Rep. 468. While such companies are not required to extend their facilities beyond such reasonable limits as they prescribe for themselves, they cannot discriminate between individuals of classes which they undertake to serve." And see *Thompson on electricity*, §§ 104, 196; 85 Am. & Eng. Corp. Cas. 24 note.

6. Railroad companies. The duties of railroad companies to serve the public without unjust or unreasonable discrimination has been considered at length in note to *Union Pac. R. Co. v. Goodridge*, post.

7. Conclusion. It is always unsafe to generalise in matters of this sort—and we shall not undertake to do so. We shall content ourselves with quoting from an article by Mr. Hamilton on the "General Rule of equality and reasonableness," to be found in 24 Am. Law Rep. p. 578. Referring to railroad, gas, water, telegraph and telephone companies and the like he says:—"Ordinarily such companies are private, not public corporations, and their duties to the people result, not from their status as public or private corporations, but from the nature of the business they are engaged in, that business whether it consists in supplying transportation, communications, gas, water, quotations of prices or anything else, is serving the public, and when anyone even a private person, undertakes to serve the public, he or it must render the service, whatever it may be, impartially for all, and without undue preference, or unjust prejudice towards any. It is the fact that the service is for the public, and not the legal status of the servant that determines the rule of law that governs its performance."

FARWELL FARMERS' WAREHOUSE ASS'N v. MINNEAPOLIS, ST. P. & S. S. M. RY. CO.

(Supreme Court of Minnesota. Sept. 8, 1893.)

1. RAILROAD COMPANIES. DUTY IN REGARD TO SIDE-TRACK FACILITIES TO GRAIN WAREHOUSES: DISCRIMINATION. By chapter 10, § 2, subd. b. Laws 1887, a railway company is obliged to give equal or substantially similar facilities for the transportation of grain to all persons who in good faith, erect or desire to erect warehouses at any of its stations; and if a demand therefor is unreasonably refused the state railway and warehouse commission may, after due investigation, proceed to enforce the performance of such duty.

2. A railway company may impose reasonable terms and conditions upon persons who demand such facilities, but they must be the same for all.

Alfred H. Bright, (M. B. Koon, of counsel,) for app't; *H. W. Childs* and *Horace Austin*, for resp't.

VANDEBURGH, J.—The plaintiff, having erected a warehouse adjacent to the right of way of the defendant in the village of Far-

well, Pope county, demanded of the defendant company that it construct a side track to the same on its right of way, to enable it to ship grain received and stored therein; and upon the refusal of its request complaint was made to the railroad and warehouse commission of the state. An investigation was had thereon by the commission in pursuance of the statute, and its findings of fact and conclusions of law made and filed, granting the petition. These findings and conclusions were adopted and affirmed by the district court on appeal, and upon the same record the appeal from the judgment of that court is to be determined here. The gist of the complaint is that the defendant has refused to grant to the plaintiff the same privileges or equal facilities for the shipment of grain which it has conceded to other warehousemen at the same station, and has unlawfully discriminated against the plaintiff in that respect.

The findings material to the consideration of the case are as follows: "That on the 22d day of October, A. D. 1889, the said complainant duly organized under its articles of incorporation by the election of its officers, and commenced the business for which it was incorporated; and, being then prepared and ready for the transaction of its business, did, on the 26th of said month, make application in writing to the defendant for a site or location on which to erect a grain warehouse in which to transact its said business on defendant's right of way at said Farwell station, and along side of defendant's track thereat. That said defendant unconditionally refused said application, and wholly neglected to comply with the same. That upon such refusal upon the part of the defendant the complainant purchased and obtained a site and location for a grain house at said Farwell station, and adjacent to defendant's right of way, as near as practicable to the station building and side track of the defendant, and did then and there construct a grain house, and furnish the same with necessary equipment for storage handling, and shipment of wheat and other grain. That this grain house was completed and ready for the transaction of such business in the autumn of 1889, and has been occupied by the complainant in the buying, handling, and shipping of wheat and other grain ever since its completion. That said grain house is fifty-five (55) feet from the main track of the defendant's line of railway, and on land owned by the complainant. That on the

4th day of February, and on the 25th day of September, 1890, the complainant demanded of the defendant, in writing, that defendant should construct or furnish a side track or spur track at said Farwell station, which should connect by rail the said grain house with the defendant's main line or side track. That defendant could then have so constructed and can now construct such side or spur track as that no part of the same would be off its right of way. That the defendant has at all times refused and neglected to comply with such demand. That the defendant corporation had not only allowed other persons or associations to erect and maintain elevators and grain houses on its said right of way, and in connection with its side tracks at said Farwell station, previous to the making of the complainants' said application, but had also theretofore permitted other persons and associations to construct and erect grain warehouses and elevators at the station on said road next to the east and at a station thereon next to the west of said Farwell station, and not more than six miles therefrom in either direction. That such warehouses and elevators were built and erected at the said stations pursuant to such permission and consent of the defendant before the making of the complainant's said application, and have, since the erection of the complainant's said house, been operated and conducted in competition therewith; and the same is also true of the two grain houses erected on the right of way at said Farwell station, as shown in the evidence." "We find from the evidence that by reason of the defendant's refusal to permit the erection and maintenance of the grain house of the complainant upon the right of way of the company and in connection with the side track at said Farwell station the complainant has been compelled to transfer the grain by it offered to the defendant company for transportation from its grain house to its cars by wagon, and that the cost of said transfer from the date of the erection of said warehouse to the present time as has been the sum of six hundred ten and 75-100 dollars."

Railroad corporations are quasi public corporations, and enjoy privileges and franchises granted by the state in consideration of the general benefits which the public may be expected to derive from the operations of the roads. They must, therefore, subject to certain necessary and proper limitations, which the law will recognize, be operated so as to reasonably accommodate the business

and subserve the best interests of the public. One of the most important of these interests in an agricultural community is the marketing and transportation of grain ; and the price may in any particular case be affected to a greater or less extent by the facilities for transportation afforded, and the opportunity for competition by purchasers. It is undoubtedly a subject proper for legislative cognizance. It is an essential condition to the right of eminent domain by a railroad corporation that all the people should have the right to use the road on equal terms ; and it is the policy of the law not to permit such corporations to grant special privileges to any persons which are denied to others under like conditions. This is declared by the act of 1887 regulating common carriers and prescribing the duties of the railroad commissioners. Laws 1887, c. 10. § 2, subd. b. In our judgment, the following legal conclusion, based upon the facts found in the case, was warranted thereby, and authorized the judgment appealed from: "That the defendant corporation, in refusing the complainant a site for its grain house on defendant's right of way, when the same was demanded by it, while admitting other persons and associations engaged in the prosecution of the same class of business to erect and maintain grain warehouses or elevators on said right of way, as well as in affording them free side track accommodations in connection with such grain houses and elevators, while such privileges were by the defendant denied to the complainant, was and is guilty of unjust and illegal discrimination toward and against said association." There is no doubt of the good faith of the plaintiff, and the amount of business transacted by it under unfavorable circumstances shows that there is a public demand for the maintenance of its warehouse. It is entitled to be placed on an equal footing with other dealers and warehousemen at the same station. The discrimination against it appears to be unreasonable, and it was entitled to the relief adjudged in its favor. It is not claimed by the respondent's counsel that the plaintiff had an absolute right to occupy the defendant's right of way, or to demand a site for a warehouse thereon. The railway company was not obliged to grant such concessions on its right of way. All that is contended for in that regard, and all that was necessarily decided in the case, is that, if it granted these privileges to others, it cannot refuse the same or substantially similar ones to the plaintiff ; and it cannot complain,

after having refused a site on its right of way similar to that granted to others, that the plaintiff should accept a site adjacent thereto, and demand a side track for its accommodation which the court finds to be a reasonable and proper concession under the circumstances, in order to afford substantially similar facilities to the plaintiff for handling grain to those granted to others at the same station. Undoubtedly the railway company may impose reasonable conditions and terms upon persons who demand trackage for warehouses for the transportation of grain, but they must be the same for all; and the refusal of the company to furnish such trackage at any particular station and within its right of way, so as to allow competition in the handling and transportation of grain, is a proper subject of investigation by the railway and warehouse commission under the act referred to. It is not deemed necessary to consider other questions raised by counsel in the case, especially in view of recent legislation.

Judgment affirmed.*

Railroad companies. Side tracks and station facilities. Discrimination. The foregoing case is in accord with *State ex rel., etc., v. Missouri Pac. Ry. Co.*, 29 Neb. 550; 3 Am. R. R. & Corp. Rep. 82, where it was held that a railroad company which had granted the privilege of erecting and maintaining grain elevators on its right of way at a station, to one person was bound to grant the same privilege, on like terms and conditions, to all who desired to engage in the grain business at that point. See also *Vincent v. Chicago & A. R. Co.*, 49 Ill. 33; *Chicago & M. W. R. Co. v. People*, 56 Ill., 366; *Chicago, etc., R. Co. v. Suffern*, 129 Ill. 274; *Audenreid v. Philadelphia & R. R. Co.*, 68 Penn. St. 370; *Railroad Comrs. v. Railroad Co.*, 68 Me. 269; *State v. Republican Val. R. Co.*, 17 Neb. 647.

A railroad company, owning a wharf extending into public navigable waters, maintained thereon a station and passenger depot, and used the wharf for its own line of steamers in connection with its railroad traffic. Held, that a steamboat company, not a rival of the railroad company in its railroad business, was entitled to the use of the wharf, for a reasonable compensation, to the extent of receiving and discharging passengers and freight. *Oregon Short Line, etc., R. Co. v. Ilwaco R. & N. Co.*, 51 Fed. Rep. 611. That such wharf is too small to accommodate steamers, other than those of the railroad company, is not a ground for denying to a steamboat company, not a competitor except in its steamboat business, the right to use the wharf, for a reasonable wharfage, for the purpose of receiving and discharging freight and passengers, since a railroad, as a public carrier, must provide necessary facilities for the transaction of its business with safety and reasonable convenience to its passengers. *ibid.*

* Reported in 56 N. W. Rep. 248.

FREDERICKS v. NORTHERN CENT. R. Co., ET AL.

(Supreme Court of Pennsylvania. Oct. 2, 1898.)

1. COMMON CARRIERS. DEGREE OF CARE REQUIRED FOR THE SAFETY OF PASSENGERS. GENERAL RULE WITH ITS QUALIFICATIONS. The rule that a carrier of passengers is bound to exercise the highest degree of care that is possible to human foresight and prudence, does not make the carrier an insurer against accidents, nor require it to prevent an accident by the employment of means which, if the accident could have been foretold, might have been used to prevent it; nor does the rule render the carrier liable for the wrongful acts of strangers, unless the carrier was remiss in not discovering them in time to avert the injury; nor is the carrier required to exercise an impracticable character or extent of precaution which could not be observed without so serious a cost as to destroy the business; and in all cases the liability is only such as results from negligence.

2. LIABILITY FOR ACCIDENT CAUSED BY THE CRIMINAL ACT OF A STRANGER. A carrier of passengers is not required to take precaution against the criminal acts of strangers which could not have been foreseen by any human skill or diligence, and negligence does not arise from the want of such precautions.

3. The crew of a freight train placed several loaded cars on a side track, securely tightened the brakes, and threw off the switch, so as to prevent the cars from getting on the main track, and so as to derail them, if they did get loose. A boy, not in any way connected with the railroad company, turned back the switch, opened the brakes with a hammer, detached two of the cars, and started them down the side track. They reached the main track, and within a very few minutes collided with a passenger train, killing several passengers and injuring others. *Held* that, the collision being caused by the criminal acts of a stranger, the presumption of negligence arising from the fact of the accident was completely rebutted; and that, the court having submitted to the jury the question whether the failure to block the wheels of the cars, to lock the derailing switch, and to place in position another throw-off switch, further down the side track, was a failure to exercise the highest degree of care possible to human foresight and prudence, a verdict of the jury in favor of the railroad company was conclusive that it was not negligent.

4. INSTRUCTIONS. In view of the fact that the accident was the result of the willful criminal trespass of a stranger, for which the railroad company was not responsible, it was not reversible error for the trial court to fail to emphasize and reiterate the rule that the company was bound to use the highest degree of care, skill, and prudence that was humanly possible.

5. PRACTICE. EFFECT OF TRIAL JUDGE EXPRESSING HIS OPINION ON THE EVIDENCE. The fact that the judge, in submitting to the jury the question of the company's negligence, remarked that personally he did not think the com-

pany careless in not locking the derailing switch, and in not opening the lower switch, and that in his opinion the company was not responsible for the misconduct of the boy, is not such an unauthorized invasion of the province of the jury as will require a reversal.

STERRET, C. J., dissenting.

TRESPASS by Joseph A. Fredericks against the Pennsylvania Railroad Company and the Northern Central Railway Company for injuries to plaintiff while a passenger on defendant's road. There was a verdict in favor of defendants, and from a judgment thereon plaintiff appeals.

Josiah R. Adams and *Samuel B. Huey*, for appellant. *Geo. Tucker Bispham*, for appellees.

GREEN, J.—There is not the least question as to how the collision occurred which resulted in the plaintiff's injury. Two loaded coal cars, which had been standing on a side track, at a distance of almost two miles from the place of collision, were detached from a number of other cars to which they were coupled. A throw-off switch which would have derailed the cars if left undisturbed was closed so as to lead the cars on the side track, down a moderate grade, until it joined the main track. There the cars collided with a miners' train on which the plaintiff was riding as a passenger, and killed two persons and injured others, among whom was the plaintiff. The coal cars which had attained a very high speed, ran into the miners' train from behind, and drove the forward car on which the plaintiff was riding, into the tender and engine. The plaintiff was a passenger and was injured without any fault of his own. As the injury was inflicted by a collision of other cars on the track of the defendant company, he was entitled to, and received the benefit of the legal presumption that the injury was the consequence of the defendant's negligence, which presumption it was the defendant's duty to rebut, or suffer a recovery of damages by the plaintiff. The only substantial question in the case was whether the presumption of negligence was rebutted by the evidence. That question was left to the jury by the learned court below, and the jury found that it was, by returning a verdict in favor of the defendant. It is difficult to see how any other verdict could have been returned consistently with the testimony. The evidence, which was entirely uncontradicted, showed

that a small train consisting of four loaded and six or seven empty coal cars was taken up the Northern Central track over on the side track, which belonged to the Philadelphia & Reading Railroad Company, but was used by the defendant, at about half past ten o'clock in the morning. The engine was detached from the train, and the cars were left standing on the side track, and remained there during the day. The loaded cars were in front. There was a throw-off switch on the track upon which the cars were left standing, a short distance below the cars. The conductor, Linderman, was asked: "Question. Tell the jury what you did with the draught of cars when you got up there; whether any of the brakes were put on, and whether any thing was done to the shut-off switch. Tell us first about the brakes. Answer. The brakes were put on by the men, and I threw the throw-off switch back personally, myself, when the engine run back over it. Q. You left the cars standing there, did you? A. Yes, sir. Q. You went back with the engine? A. Yes, sir. Q. Of course the throw-off switch was closed when the engine went over it? A. Yes, sir. Q. After the engine passed over it, who threw the throw-off switch? A. I did." The fireman of the train, Joseph A. Eadie, having testified that he was on the train, and they took the cars to the point stated by Linderman, above the throw-off switch, was asked: "Question. After you got the draught of cars up there, did you do anything to the brakes? Answer. I set three brakes. Q. On what cars? A. On the first and second; two on the first and one on the second car. Q. Were those the cars that were nearest to the locomotive? A. Yes, sir. Q. Those were the two loaded cars, were they? A. They were. Q. Were the cars coupled together? A. Yes, sir. Q. Were they left coupled? A. They were. Q. The entire draught was left coupled? A. They were all left coupled that we took up there. * * *

Q. Did you leave on the locomotive with the engineer and conductor? A. I did. Q. And the rest of the crew? A. Yes, sir. Q. You left the cars standing there? A. Yes, sir. Q. What was done with the throw off switch? A. The conductor threw the throw-off switch back. Q. Was that before or after the locomotive had passed over it? A. After it passed over it. Q. After it was thrown, the switch was open? A. It was. Q. If the cars had started to run down in that position they would have been

thrown into the meadow by the miners' houses, would they not? A. Yes, sir. W. L. Eadie, a brakeman, having testified that he was on the cars as brakeman, that the cars were left standing on the track above the throw-off switch, and that he went back on the engine with the others, was asked: "Question. After the engine had passed this throw-off switch, did you notice the conductor do anything? Answer. Yes, sir; he threw the throw-off switch open. Q. You were with him when he did that, were you? A. Yes, sir; him and I were on the point together after he did it. Q. The switch was open when you left it? A. Yes, sir." The testimony of the foregoing witnesses proves that the two cars that escaped were duly braked, by setting both brakes on the front one and one brake on the rear one, and also that the throw-off switch below the cars was thrown open, and that, if left in that condition, the cars, if started, could not run on the track, but would be thrown off in the meadow. Other brakes were set on the other cars, but it is not necessary to recur to that testimony, because their sufficiency to hold the cars was conclusively established by the fact that they did hold them. They did not leave but remained standing where they were placed after the two loaded cars had been detached and left.

The question whether the precautions taken by the defendant's men were sufficient to hold the cars in place was fully illustrated by the testimony of F. W. Monier, who was shipping clerk of the Excelsior colliery, which was further up the track, and above the cars. He testified that he saw the cars in the morning, and again in the afternoon. He was asked: "Question. When did you examine the throw off switch? Answer. In the afternoon, about half past four or five o'clock. Q. That was before the cars ran away? A. Yes, sir. Q. What was the condition of the throw-off switch then,—was it open or closed? A. It was open. Q. So that, if the cars had started, and the switch in that condition, they would have been ditched? A. Yes, sir. Q. Did you take notice of the condition of the brakes on this draught of coal cars? A. I did. Q. Did you notice the condition of the brakes in the afternoon? A. I only noticed the condition of the brake about about half past four or five o'clock. Q. Please tell the jury what condition you found the brakes in; whether you examined the brakes, and why you did it, and what condition you found the brakes in

at half past four o'clock in the afternoon. A. I examined the first three brakes on the train nearest to the throw-off switch. I found the brakes set. Q. Were they set hard or tight? A. Yes, sir; the brakes were set very tight. I could not make them any tighter. I tried to tighten the brakes up tighter. The brakes were set tight enough to hold the cars. The switch was set to throw the cars off in case anything would happen to them. Q. The brakes that were set, were they on the car nearest to the switch? A. The first three brakes; yes, sir. The two brakes on the first car and the first brake on the second car were set. Q. Did you look at the brakes yourself? A. Yes, sir; I examined the brakes. The brakes were all right." The testimony of the last witness shows the condition of the cars, the brakes, and the switch at nearly or quite five o'clock in the afternoon. The cars were in the same position as when they were left by the crew in the morning at eleven o'clock. The brakes on the two cars in question were in the same condition as then,—they were set tight, and held the cars. The throw-off switch was open, as it was left in the morning, so that, if the cars had started, they would not have run down the track, but would have been derailed on the meadow. The absolute sufficiency of the precautions taken was conclusively proved by the fact that they did prevent the cars from starting, and made it impossible for them to run down the track if they had started. It cannot, therefore, be argued that they were insufficient. The jury has found that the defendant did its whole duty in the way of precautions, and was not guilty of any negligence which led to the collision.

The manner in which the collision was produced was fully shown by the evidence, which was entirely uncontradicted. Between five and six o'clock on the same afternoon a boy named John McCoskey got on the cars between the second and third cars, and was seen hammering at the ratchet wheel of the brake with a coupling pin which he had in his hands. A very few minutes before he got on the cars he turned the throw-off switch in front of the cars so as to close it, and let the cars run down on the track. He hammered at the cog which holds the brake for a minute or so, until he got it loose when the cars started on the track. Three boys testified to seeing this and, one of them Alexander Smoogen jumped on the cars and tried to stop them with the brakes, but did not succeed, and

he then jumped off to save himself. The cars ran down on the side track, and on to the main track, where they collided with the miners' train, and did their dreadful work. There is not the least dispute as to this state of facts, and the jury confirmed it by their verdict. It will thus be seen that the collision was produced by the criminal trespass of a stranger to the defendant company, for whose acts they were not in the least degree responsible, and over whom they had no control. The offense of which the boy McCoskey was guilty in misplacing the switch was a most atrocious and abominable crime, for which under the crimes act of 1860 he was liable to a fine of \$10,000, and an imprisonment at labor for ten years. By the law of May 26, 1891, (P. L. 121), the penalty for the same offense when it results in death, is a conviction of murder.

The question in this case is whether the defendant company was bound, in the exercise of its duty of extraordinary care, to take extraordinary precautions against the grossly criminal acts of strangers. That it did take amply sufficient precautions against everything short of the griveous crime of misplacing a switch is conclusively established by the uncontradicted evidence in the case and by the verdict of the jury. The learned court below did, with some well founded hesitancy, commit to the jury the question of the defendant's negligence in the precautions it took. It was argued in the lower court, as here, that the defendant might have opened the lower switch, or put locks on the switches, and therefore they did not exercise the very highest degree of care which was possible to human skill, prudence and foresight. But this argument overlooks the fact that the upper switch was left open, which made it impossible for the cars to get to the lower switch, and the further fact that any person who would misplace a switch would break a lock, if it were there. But the argument is fatally defective in that it is founded upon the theory that transporting companies are legally bound to take precautions against the criminal acts of strangers, and are responsible for such acts if they do not. We have not been referred to any case, and we know of none, in which such doctrine has ever been held. In the case of *Railroad Co. v. Hummell*, 44 Pa. St. 375, this court said: "If the law declares—as it does—that there is no duty resting upon any person to anticipate wrongful acts in others,

and to take precautions against such acts, then the jury cannot say that a failure to take such precautions is a failure in duty, and negligence. * * * Were it worth while abundant authority might be cited to show that the law does not require any one to presume that another may be negligent, much less to presume that another may be an active wrongdoer. * * * It is too well founded in reason, however, to need authority. We act upon it constantly, and without it there could be no freedom of action." The rule that the carrier is bound to exercise the highest degree of care that is possible to human foresight and prudence does not require a construction that will make the carrier an insurer against accidents nor the prevention of accidents by the employment of means which if the accident could have been foretold, might have been used to prevent it; nor for the wrongful acts of strangers, unless the carrier was remiss in not discovering them in time to avert the injury; nor for an impractical character or extent of precaution which could not be observed without so ruinous a cost as to destroy the business; and in all cases the liability is only such as results from negligence. Our own cases illustrate all these qualifications of the rule of highest possible care. Thus in *Meier v. Railroad Co.*, 64 Pa. St. 225, the plaintiff's injury was sustained while he was a passenger on a sleeping car in consequence of the breaking of the axle of the forward truck in two places. The end of the car then dropped down and slid along the rails. The plaintiff was thrown forward, the ligaments of the right knee were torn, and the bones of his leg were severely bruised. The plaintiff was entirely without fault, and the accident was the result of a defect in the axle. Of course the presumption of negligence arose, and the defendant undertook to rebut it by proving that new wheels and axles had been put on a few months before, and that they were of good quality; that they were constantly inspected; that the road was in good order, and the train running at proper speed; and that they had employed such appliances as were approved by the most experienced railroad operators and mechanics. The case was tried in the district court of Philadelphia by the very able and distinguished Judge Thayer, then of that court, who submitted the question of negligence to the jury in a lucid and exhaustive charge, which received the full approbation of this court. The verdict was for

the defendant. The plaintiff sued out a writ of error, and assigned portions of the charge, which qualified or rather carefully stated. the rule of highest possible care; but this court approved his rulings, and sustained the judgment. The following language of the charge was assigned for error: "That common carriers of passengers are liable only for negligence. They are not insurers of the safety of their passengers, like common carriers of goods.

* * * But common carriers of passengers are not liable for injuries happening to passengers from unforeseen accidents, where there has been no negligence. They do not undertake absolutely to be responsible for unavoidable accidents,—for accidents, in a word, which are not the result of their own negligence." Concerning this part of the charge, Mr. Justice Agnew, delivering the opinion of this court, said: "It is agreed on all hands, says Judge Redfield, in his work on Railways, (Ed. 1867, p. 174), that carriers of passengers are liable only for negligence, either proximate or remote, and that they are not insurers of the safety of their passengers, as they are as carriers of goods and baggage of passengers. The numerous cases cited from which this result is drawn justifies this statement. * * * In all the Pennsylvania cases it will be found that negligence is the ground of liability on the part of a carrier of passengers. Absolute liability requires absolute perfection in machinery in all respects which is impossible." Judge Thayer also charged: "(2) That the rule in regard to carriers of passengers is this: The utmost care and vigilance is required on the part of the carrier. The rule does not require the utmost degree of care which the human mind is capable of imagining but it does require that the highest degree of practicable care and diligence should be adopted that is consistent with the mode of transportation adopted. Railway passenger carriers are bound to use all reasonable precautions against injury of passengers, and these precautions are to be measured by those in known use in the same business which have been proved by experience to be efficacious. The company are bound to use the best precautions in known practical use. That is the rule; the best precautions in known practical use to secure the safety of the passengers; but not every possible preventive which the highest scientific skill might suggest." In regard to this part of the charge we said: "The rule laid down by the learned judge in the language quoted in the se-

cond assignment is a correct summary of the law. The rule of responsibility differs from the rule of evidence. *Prima facie*, where a passenger, being carried on a train, is injured without fault of his own, there is a legal presumption of negligence casting upon the carrier the onus of disproving it, [citing several cases]. This is the rule when the injury is caused by a defect in the road, cars, or machinery or by a want of diligence or care in those employed, or by any other thing which the company can and ought to control as a part of its duty to carry the passenger safely. But this rule of evidence is not conclusive. The carrier may rebut the presumption, and relieve himself from responsibility, by showing that the injury arose from an accident which the utmost skill, foresight, and diligence could not prevent. * * * To ask more is to prohibit the running of railways, unless they possess a capital and surplus which will enable them to add a new element to their business,—that of insurance." It will be observed that the rulings of the court below were approved in a case in which the passenger was injured while traveling on the defendant's car, without any fault of his own, and where the cause of his injury was a defect in one of the axles of the car, in consequence of which it broke. An appliance was defective, and the defendant was relieved from liability, although the defect was not discovered, and the rule of highest skill, foresight, and diligence was held not to be infringed by the non-discovery of the defect.

How much stronger is the present case. Here the injury was not the result of any defect in any of the appliances used by the defendant, nor by any want of skill, foresight, and diligence which was humanly possible. The injury was not the result of any act of carelessness or negligence on the part of anybody. It was the result, exclusively, of a deliberate, intended, willful, affirmative, positive act of criminal trespass. No mere act of carelessness or negligence could have turned over the switch, which was set to derail the cars, so that it would throw the cars on the track instead of off. No mere act of carelessness or negligence could or would have taken out the coupling pin which held the cars together. No mere act of carelessness or negligence could or would have driven back the ratchet which held the brakes in place,—four of them in all,—so as to set the cars in motion. All and


every one of these acts required special physical effort, exerted for the very purpose of releasing the cars from the entirely sufficient restraints which had been imposed upon them by the company's agents and these efforts were made each one after the other, in a wicked and deadly succession, until the horrible purpose was accomplished, and the work of death and destruction resulted. How can it be said that any human skill, foresight, or diligence could have divined or believed or imagined that such acts would have been perpetrated? It would require a gift of omniscience to foresee them, a gift of prophecy to foretell them, and neither of these qualities is human. It is useless to say that additional precautions might have been taken. So they might, if the possibility of such acts could have been known in advance. A force of men might have been stationed at the cars to prevent the possibility of another force of men invading them and setting them loose, but such transactions are outside the pale of human experience, and it is simply preposterous to say that the omission to take that kind of precaution is negligence in any conceivable aspect of the case. Placing blocks under the wheels and locks on the switches avail nothing against the deliberate willful, and intended purpose to set free loaded cars in such circumstances as these. The same purpose which would turn over the switch, take out the coupling pin, and then hammer at the brakes until they were opened, would remove the blocks from the wheels and shatter the lock on the switch. But it is not one or another particular act of precaution, the want of which is to be set up as a test of the legal duty of precaution, but the whole criminal purpose sought to be accomplished. If that purpose and corresponding action were such as not to subject the defendant to a duty of precaution against it, the presence of some precautions, and the absence of another, which might or might not have been effective, or might have been more effective than those that were observed, is of no moment in the consideration of the general question as to the existence of the legal duty. If the purpose and the act were criminal, and were those of a stranger, and could not have been foreseen by any human skill or knowledge, the duty of precaution against such acts does not arise, and negligence does not result from the want of such precautions. The rule of highest skill, care, and prudence does not require the impossible, or the very extreme of care and precaution that can be

imagined. In Shearman & Redfield on Negligence (section 266) it is thus expressed: "This doctrine is not to be construed as meaning that the carrier must adopt all the precautions that an ingenious mind could suggest, or have all that skill that science could give, nor that he must use all the precaution which, after an accident has happened, it can be seen would have sufficed to avoid it, nor even that he must use such precautions as one would use who knew beforehand that the accident would otherwise certainly occur." Again at section 270, the writer says: "A railroad company is certainly not liable for an injury arising from a break in its tracks, caused by a sudden and extraordinary flood, or by the willful act of a stranger, unless the injury happens to a train which the servants of the company run upon the broken road after they, or those who ought to advise them, have had notice of its condition, or have had sufficient opportunity to learn it." In 2 Wood's Railway Law, at section 302, the writer, presenting the subject in words nearly identical with the foregoing, continues: "The law does not require such particular precaution as, it is apparent after the accident, might have prevented the injury, but such as would be dictated by the utmost care and prudence of a very cautious person before the accident, and without knowledge that it was about to occur. The defendant must use the highest degree of practicable care and diligence that is consistent with the mode of transportation adopted." This was the precise language of the court in the case of *Bowen v. Railway Co.*, 18 N. Y. 408. The rule is stated in the same way in *Redfield on Carriers* (section 347 and note 19.) The rule is stated in substantially the same way in 2 *Rorer on Railroads*, (page 955), thus; "But this rule of greatest possible care is not to be understood as requiring the utmost degree of care which the human mind can attain to or is capable of inventing. Such applications of it would involve such an expenditure as would tend to prevent all persons of ordinary prudence from engaging in the business. It simply means greatest degree of care that is consistent with that mode of transportation. It does not contemplate such a measure of care as will render it practically impossible to continue the railroad transportation of passengers.

* * * They are by no means insurers of human life, and are not accountable for the results of latent defects which the usual and well-recognized tests of science and art fail to detect; nor

are they liable for accidents which skill and experience are unable to foresee and avoid."

The very question which arises in this case was decided in *Deyo v. Railroad Co.*, 34 N. Y. 9. The plaintiff was a passenger on the railroad of the defendant at night. "The train was thrown from the track through the culpable act of some unknown person, who maliciously or mischievously drew the spikes which fastened the chairs and the rails. Marks were visible on the ties of a claw bar having been used in removing these spikes. Two trains had passed over this section of the road at the point where the injury happened. * * * The road was in good condition when these trains passed over it in safety and without any obstruction." *Davies, J.*, in delivering the opinion, said: "The only question upon this appeal is whether there was any evidence of negligence on the part of the defendants or their servants sufficient to warrant the learned justice who tried the action in submitting that question to the jury. It is a familiar principle that carriers of passengers are not insurers of the safety of their passengers. Their duty is measured by the dangers which attend railroad carriage; and the utmost foresight as to possible dangers, and the utmost prudence in guarding against them, are required to exempt them from liability in case of injury to a passenger. * * * There was no evidence in this action of any negligence on the part of the defendants, their servants or agents. This portion of the track was laid with the best and most improved rail. It was in perfect order. It had been passed over by their track master a few hours before the accident. Within two hours before it occurred three trains of cars had passed over it in safety, and it must then have been in complete order. The proximate cause of the accident was the removal of the spikes which fastened the chairs and rails to the ties and sleepers. It is apparent that as soon as these fastenings were removed, a superincumbent pressure would displace the rails, and thus inevitably throw the cars off the track. No human care or foresight could guard against such a diabolical act, committed under the circumstances developed in this case. It is clear that these fastenings must have been removed after the last train going east had passed the point where the road was disturbed." The court below had on the trial granted a compulsory nonsuit, and the court of appeals affirmed the judgment, saying: "If,



therefore, the jury on this testimony had found that the defendant had been guilty of negligence, it would have been the duty of the court to have set aside the verdict." It will be observed that in the case just cited there was no affirmative proof as to who removed the spikes, and thus caused the rails to become displaced. There was, therefore, a possibility that they might have been removed by some vindictive employe who had been discharged. In fact there was evidence to prove just such a state of facts, but nevertheless the court held that the company was not liable. But in the case at bar there was full proof that the cars were uncoupled and the brakes loosened, and the switch turned back, by a person who was a total stranger, and having nothing to do with the defendant company, and for whose acts, therefore, the company was not responsible in any conceivable manner.

The case of *Curtis v. Railroad Co.*, 18 N. Y. 534, is another instance in which the same doctrine of non-liability was held, although there the evidence was sufficient to warrant a verdict of negligence. The plaintiff was a passenger, and was injured by the car running off the track at a switch at a station, which was misplaced, on the main track. There was no evidence to show how it became misplaced, and as it was at a station there was sufficient evidence of want of care to carry the case to the jury. But the court of appeals, in their comments upon the rule of duty applicable in such cases, said: "Carriers of passengers are not insurers, and many injuries may occur to those they transport for which they are not responsible. They are, for obvious reasons, held bound to exert the utmost care and vigilance to secure the safety of passengers, and are responsible for the slightest negligence. But injuries may often happen through the fault or misconduct of those whose acts are in no way chargeable to them. * * * Still accidents may occur from a multitude of causes, even upon a railroad, for which the company is not responsible. If obstructions are placed by strangers upon the road, either through accident or design, the company is not responsible for the consequences, unless its agents have been remiss in not discovering them." That is precisely this case. these cars were in a place of safety, and amply secured against either leaving their position or running on the main track, by a switch, so as to derail them if they did get loose. But they were detached from the other cars, their brakes were opened, and

the derailing switch turned back by one who was a stranger, and within a very few minutes after this was done the collision occurred. There was no time for the defendant's agents to discover the mischief, and they cannot be charged with negligence in that respect. So far as this defendant is concerned, it is of no consequence who it was that committed this crime, nor what his motives were. He was a stranger, over whom they had no control, and they were not responsible for his acts.

In two of our recent cases the rule of the presumption of negligence from the mere fact that the plaintiff was a passenger, and was injured, has received qualifications which are strictly applicable to the case at bar. The first of them is *Railroad Co. v. MacKinney*, 124 Pa. St. 462; 17 Atl. Rep. 14, in which the plaintiff was a passenger on the defendant's train, and, while reading a newspaper in his seat at an open window, was struck in the eye by a hard substance, and seriously injured. On the trial the court below instructed the jury that they should start with the presumption that the defendant was guilty of negligence from the mere happening of the accident, and that it thereupon devolved upon the defendant to rebut that presumption, and show that they were not negligent. We held that this was error, because the accident occurred from something extraneous to the railroad and the appliances of travel, and it would be necessary for the plaintiff to go further, and affirmatively prove that there was negligence. The present chief justice, in delivering the opinion, pointed out the difference between an accident resulting from the mere operation of the road and one which was the result of some extrinsic cause. In the former the presumption of negligence arose from the mere happening of the accident; in the latter no such presumption arose, and the fact of negligence for which the defendant was responsible must be proved by satisfactory testimony, just as in any ordinary case between strangers. Concluding, he said: "If the case had been submitted to the jury on the evidence, and they had found therefrom that the plaintiff's injury resulted from something connected with the operation of the railroad, and not from something entirely disconnected therewith, and with which neither the company nor its employes had anything whatever to do, that would have raised *prima facie* a presumption of negligence on the part of the company, and thrown upon it the burden of

proving that it did not exist." In the present case, the injury having occurred as the result of a collision of cars on the railroad, the plaintiff was entitled to the benefit of a presumption of negligence, and the court below so charged the jury. But the defendant met and rebutted that presumption by showing conclusively, and without the least contradiction, that the collision was occasioned solely by the criminal act of a stranger, with whom neither the company nor its agents had anything to do. As this was an undisputed fact, it is almost impossible to understand why the learned court below would not have been justified in withdrawing the case from the jury, as was done in the case of *Deyo v. Railroad Co.*, *supra*, on the ground that upon the whole testimony no negligence was shown for which the defendant was responsible. But the learned court left that question to the jury, and the jury found that the defendant was not guilty of any negligence which produced the injury, and that verdict, of course, settles the question.

The appellant claims that the court below did not dwell with sufficient force and emphasis upon the rule of the highest degree of skill, care, and prudence which was humanly possible. It is sufficient to say in reply that, in view of the entirely uncontradicted testimony in this case, it was only necessary to inquire whether the defendant had rebutted the presumption of negligence which arose from the mere fact of the injury. There was nothing in the case but the mere presumption. All of the actual testimony as to the real facts of the occurrence tended in a most eminent degree to show that there was no negligence for which the company was responsible, and that the injury was the result of the willful, criminal trespass of a stranger. In such circumstances the highest inquiry that could be legitimately conducted by the jury was whether there was any negligence on the part of the defendant in the precautions taken against such an accident. That question was fully submitted by the learned court to the jury, with instructions to find for the plaintiff if they found such negligence. The appellant's points on the subject of the highest possible degree of care were affirmed, and the remark of the court below, that the principle was very strongly expressed, was entirely correct in view of the manifest facts of the case. So, also, his expression of individual opinion that the precautions taken by the defendant were

sufficient to relieve them of the charge of negligence was appropriate and just in view of the testimony. He distinctly told the jury it was for them to decide the question, and left them entirely free to act upon their own judgment. In the case of *Latch v. Railway Co.*, 3 Hurl. & N. 930, the plaintiff's trucks were derailed by the misplacement of the points of a siding. There the evidence showed that shortly before the accident a stone was found inserted under the lever of one of the points, and the defendant claimed that this had caused the accident, and, as it was the willful act of a stranger, they were not responsible. The judge who tried the case thought there was no evidence of actual negligence, and told the jury that if the defendant's account was correct they were entitled to a verdict, unless the jury thought there was negligence in not having a person to take care of the points, and he said he did not think there was. A verdict was rendered for the plaintiff, and on a rule for a new trial the case was heard in bank, and the rule made absolute. The court said: "There was evidence that there had been a willful act on the part of a stranger which would have caused the accident, and no evidence of negligence on the part of the defendants. None was suggested, except their not having a person always at the spot to look after the 'points,' which they were not bound to have. The siding had been in that state for months, and no accident had happened. The verdict was clearly contrary to the evidence, and there must be a new trial." In this case there was no proof as to who had placed the stone under the lever, and the verdict had found negligence as a fact, but the court set it aside as unwarranted by the testimony. Our own very recent case of *Thomas v. Railroad Co.*, 148 Pa. St. 180; 23 Atl. Rep. 989, affords a still more striking illustration of the inapplicability of the rule of the highest possible care in the case of an injured passenger, and of the necessity of affirmative proof of actual negligence before a recovery could be had. The facts and the conclusions of this court are well stated in the opinion of Chief Justice Paxson: "On June 5, 1890, the appellant was a passenger on the cars of the defendant company, and in the vicinity of Pottstown was struck on the arm by a missile with sufficient force to cause a fracture thereof. It was not shown what caused the injury. The appellant did not see the missile, nor was it found in the car. There was no evidence that any one was near the train

on the outside who could have inflicted the injury. This suit was brought to recover damages for the injury referred to. The theory of the appellant was that it was caused by a loose nut, thrown from one of the switches of the defendant's roadbed, over which the train was passing at the time. This was a mere theory, however, without any evidence to sustain it. The appellant contended that under such circumstances the question of the defendant's negligence should have been submitted to the jury. The court took a contrary view of the case, and directed a verdict for the defendant. This was the error assigned. * * * There was nothing in the evidence to connect the accident with any defect in the cars or machinery, the movement of the train, or in any of the appliances of transportation. There was nothing therefore, to submit to a jury. It would be as reasonable to hold that a bullet fired into the car from without, by means of which a passenger is killed, is evidence of negligence on the part of the company." It will be seen that in this last case the rule that a presumption of negligence arises in favor of a passenger traveling on a train from the mere fact of the accident was refused application, and the rule that the highest possible care must be applied was denied enforcement because there must be evidence to justify it in the intrinsic facts of the case. Neither of these rules, therefore, is of universal application, and the particular circumstances must be considered in order to determine how far they control the decision. Here the legal presumption was applied because the injury resulted from a collision of cars. But, the presumption having been fully rebutted by proof that the collision was the result solely of the criminal act of a stranger, it suffices no further purpose. Had the learned judge directed a verdict for the defendant, it is scarcely possible that we would have interfered with it. But he left the question of actual negligence to the jury, who properly decided there was none, and that is the end of the plaintiff's case. It was eminently not a case in which the jury should be fired with urgent repetition of the doctrine of legal presumption of negligence, and the rule of the highest possible human skill, foresight, and diligence, but rather one in which the precise limitations of the defendant's liability should be presented calmly and dispassionately; and this is exactly what was done.


The complaint that the judge expressed an opinion on the facts as to whether the defendant had exercised sufficient precautions is without merit. In the case of *Loibig v. Steiner*, 94 Pa. St. 466, we said: "A judge may give his opinion freely on the weight and value of evidence, for he is the best and safest adviser of the jury: but he has no authority to decide any question of fact when the party affirming it has sustained his averment by any reasonable proof. Very strong expressions of opinion on the facts are tolerated; indeed, sometimes may be necessary. * * * Exceptional cases arise where it is the duty of the judge to express his opinion of the facts, and guide the minds of the jury to a correct view of the evidence; and therefore it has been settled that when he does so without misleading or controlling them in the disposition of the facts there is no ground for reversing." In the present case the learned judge who tried it was particularly careful to say to the jury that, while personally he thought the company was not careless in not opening the lower switch or putting on locks, and that he thought the company had done all that a prudent man would do, nevertheless he left it to them to say whether there was carelessness on the part of the defendant in leaving the cars as they did. He also said that he left it to the jury to say whether the defendant was responsible for the misconduct of bad boys; that, while it was his own opinion that they were not, he was bound to leave that question to them, and did so. There is certainly no error in this. No attempt was made to control the action of the jury; the decision was left exclusively to them. The circumstances were such as to call for words of caution from the court; and the expression of an individual opinion, in view of the remarkable facts of the case, was not at all inappropriate, especially as the jury were told that it was for them to decide the whole matter. In the case of *Spear v. Railroad Co.*, 119 Pa. St. 61; 12 Atl. Rep. 824, we said: "The learned judge who tried this case in the court below was persuaded that the evidence given on behalf of the defendants was sufficient to rebut the presumption of negligence, and he had a right to express an opinion on that subject, but the question was not one of law for his determination. It is the right, and in some cases it becomes the duty, of a judge to express his opinion upon the character and weight of the testimony which he must submit to the jury, and it should be done in such

a manner as to leave them in possession of the question that belongs to them." To the same effect is *Pennsylvania Co. v. Allen*, 3 Penny. 170. *Kilpatrick v. Com.*, 31 Pa. St. on page 216: "A judge may rightfully express his opinion respecting the evidence and it may sometimes be his duty to do it, yet not so as to withdraw it from the consideration and decision of the jury." *Bitner v. Bitner*, 65 Pa. St. on page 363: "Very strong expressions of opinion on the facts are tolerated; indeed, sometimes may be necessary." In *Johnston v. Com.*, 85 Pa. St. 54, on a trial for burglary, the court in the charge said: "The commonwealth claims that evidence can establish nothing if this evidence will not establish the facts alleged in the third count; and, I, for my part, cannot see how the jury can hesitate a moment to convict the prisoner on the third count." Held not to be error under the facts of the case, although it was a strong expression of opinion. See, also, *McClintock v. Railroad Co.*, Wkly. Notes Cas., 133; *Doyle v. Railway Co.*, 147 U. S. 413, 430; 13 Sup. Ct. Rep. 333. The assignments of error are all dismissed.

Judgment affirmed.

STERRETT, C. J. (dissenting).—If the right of trial by jury, "as heretofore," is to "remain inviolable," it behooves us, in my judgment, to disapprove of such constraining influence as was improperly brought to bear upon the jury in this case. While the learned judge who presided at the trial rightly conceded that the case hinged on questions of fact which he could not, in any event, withdraw from the jury, he submitted them with evident reluctance, and with such an emphatic expression of his own opinion that said questions should all be determined in favor of the company defendant that it was next to impossible for the jury to discharge their duty, as the constitutional triers of fact, with that sense of unrestrained freedom which should always characterize the deliberations of every jury in such cases as this. Referring to the duty which the company as a common carrier of passengers owed to the plaintiff, and whether that duty had been properly performed, etc., he said: "Under the law applicable to this case I must submit the question to you to determine whether you find the defendant was careless in not opening the lower switch or putting on locks. Personally, if I were a juror, I would say, 'No.'"

If I were a jurymen, I would think that the company had done all that any prudent man would do. It braked its cars, opened the throw-off switch and left them there. But the question must be submitted to you as jurors to say whether you find it was carelessness on the part of the defendant to leave those cars there on the decline on which the cars would have run into the main road in case they had got loose." Again, he said: "There is another part of the case which is brought out with great strength under the evidence, and proved, I think, to your satisfaction,—as at least it is to mine,—that this accident was caused by the willful misconduct of certain boys; that those boys meddled with those cars and that switch, and that it was their willful misdoing that caused the accident. I leave it to you to say whether you think, under those circumstances, a company ought to be held responsible for the malicious, willful misconduct of bad boys. My own individual opinion in that case is that they ought not, but as I am bound to leave that question to you, I do leave it to you to determine." Again, in answering defendant's fifth point, in which he was asked to say, as matter of law, that "neither the absence of a lock from the throw off switch in the immediate vicinity of the coal cars, nor the failure to open the double rail switch, used as a throw off, near the Corbin colliery, can be regarded as any proof of negligence on the part of the defendant," he again volunteered his own opinion on the question as one of fact, which, as he said, "must be submitted to" the jury, by saying, in substance, that the manifest acts of omission stated in the point could not be regarded as any proof of negligence. But the learned judge's oft-repeated declarations of his own opinion on questions of fact which were exclusively for the consideration and determination of the jury, and what he would do if he were a juror, etc., are not all. There are grave errors of law for which alone the judgment should be reversed. In the paragraph first above quoted from the charge, the standard of duty applied to defendant company as a common carrier of passengers is ordinary care merely, viz.: "If I were a jurymen, I would think that the company had done all that any prudent man would do. It braked its cars, opened the throw-off switch, and left them there." It is no compliment, even to an ordinarily prudent man, to say that he would not have done more than brake the cars in such a way that even children could at any time start them down the grade on



their death-dealing errand, or open the throw-off switch, and leave the lever unlocked and unsecured in any manner, so that any thoughtless or mischievous boy could start it again with perfect ease. But when we apply to defendant's conduct in leaving the coal cars in such an insecure condition, etc., the high standard of care which the law requires carriers of passengers to exercise, how widely different is the case? The contract to carry implies that every precaution which human skill could suggest has been taken to guard against every apparent danger that may beset the passenger, and that the same degree of care will continue to be exercised until he reaches the end of his journey. The siding or branch on which the coal cars stood was of unusually heavy grade, descending rapidly to its junction with the main line, on which was the train in which plaintiff and other passengers were being transported. As a necessary precaution against the danger of cars escaping by accident or otherwise and running down on to the main line, the two throw-off switches were constructed; one near the point where the coal cars stood, and the double rail switch further down. The former was opened as is alleged, but left unlocked, and without any kind of fastening. The latter was not even opened: If it had been the escaping coal cars would have been arrested by it in their downward course. If the upper switch, alleged to have been opened, had been locked, or otherwise securely fastened, the danger of its being opened would certainly have been greatly lessened. The omission to even open the lower switch, and to use proper means to prevent the closing of the upper one, were certainly evidence of culpable negligence on the part of the company. The construction of these throw-off switches is proof of their necessity; but if they were not used, or not properly secured, of what avail could they be in averting danger? It is too plain to admit of any doubt that even suggesting to the jury that these acts of omission should not be regarded as any proof of negligence was error.

The unqualified affirmance of defendant's second point was plain error. In affirming that point, without any qualification or explanation, the learned judge instructed the jury, in the words thereof, thus: "The uncontradicted testimony on the part of the defendant shows that the proximate cause of the collision in which the plaintiff was injured was the wrongful act of trespassers

upon defendant's cars. For such wrongful act the company defendant, under the circumstances of the present case, is not responsible; and if the jury believe the said testimony as to the proximate cause of the collision their verdict should be for defendant." The vice of this instruction is that it ignores the question of defendant's omission to exercise that high degree of care which the law requires. It was clearly the duty of the company to take every precaution which human skill and foresight could suggest to guard against every apparent danger that might beset the plaintiff and other passengers. It foresaw the danger of cars being detached, by accident or otherwise, and running down the heavy grade, uncontrolled, on to the main track; and it accordingly provided the two throw-off switches to guard against that apparent danger, but it omitted to properly use the means which it had provided expressly for that purpose. It omitted even to open one of the switches, and left the other insecurely opened. That omission was at least such evidence of negligence as would have warranted the jury in finding that its neglect of duty was the cause of the collision.

There was also error in affirming defendant's first point as presented. Other errors of minor importance might be noted, but those to which special reference has been made are sufficient to show that a fair trial was not accorded to plaintiff. The emphatic and oft-repeated expressions of opinion, etc., above referred to, were unwarranted, misleading, and erroneous. They were an uncalled for invasion of the province of the jury. The line of demarcation between the duty of the court, as expounder of the law, and that of the jury, as the constitutional triers of fact, should be carefully observed. While, on the one hand, the court should not permit the jury to disregard or evade its instructions as to matters of law, it should be equally careful not to invade the province of the jury, and take upon itself the determination of questions of fact about which there is any doubt or dispute. For the reasons above suggested the judgment should be reversed, and a new trial ordered.*

1. Railroad companies—Liability for accident to employe caused by criminal act of discharged employe.—In a suit to recover for the killing of an engineer in a collision caused in part by the misplacement of a

*Reported in 27 Atl. Rep., 689.

switch by a discharged employe, who had retained a key to the switch, the court held as follows: The mere fact that a railroad company fails to recover from a discharged employe a key which controls the turning of a switch is not of itself sufficient to make the company liable for the criminal act of such employe in maliciously misplacing a switch for the purpose of wrecking a train. The company is not bound to anticipate that, purely out of revenge for his discharge, a former employe might secretly commit so heinous a crime against it and the public. Nor is the company bound to exercise constant vigilance to prevent all persons whatsoever not in its employ from having the means or opportunity of tampering with its switches or its tracks. Whether or not in any particular case the company exercised the proper degree of care in protecting its switches from interference is a question for the jury, in determining which they may look to the evidence to ascertain if there was any reason for the company to apprehend such interference, and, if so, whether, under all the circumstances, it used due diligence in endeavoring to prevent the same. In its charge to the jury, the court should not state or assume that a given state of facts would show negligence on the part of the company in the respect indicated. *East Tenn., V. & G. R. R. Co. v. Kane* (Ga.), 18 S. E. Rep., 18. See also *Mire v. East La. R. R. Co.*, 42 La. Ann., 885; 7 So. Rep., 478; 5 Am. R. R. & Corp. Rep., 128, note.

3. Injury to passenger by missile.—In an action against a railroad company for personal injuries, it appeared that plaintiff was a passenger on defendant's cars; that, while sitting at an open window, his arm was struck and broken by a missile; that he did not see the missile; and that it was not found in the car. It was not shown what caused the injury, or that any one was near the train on the outside who could have inflicted it. Plaintiff contended that the injury was caused by a loose nut, thrown from one of the switches of defendant's road-bed, over which the train was passing at the time; but there was no evidence either to sustain such contention, or to connect the injury with any defect in the cars or machinery, in the movement of the train, or any of the appliances of transportation. *Held*, that a verdict for defendant was properly directed. *Thomas v. Philadelphia & R. R. Co.*, 146 Penn. St., 180; 28 Atl. Rep., 969.

SPIER V. CITY OF BROOKLYN.

(Court of Appeals of New York, Oct. 3, 1898.)

1. MUNICIPAL CORPORATIONS. FIREWORKS, WHEN A NUISANCE.—A large display of fireworks, including heavily-charged explosives, held at the junction of two narrow and completely built streets of a large city, and managed by private persons under no official responsibility, is an unreasonable and dangerous use of the streets, and a public nuisance.

2. LIABILITY OF CITY FOR DAMAGE CAUSED BY A LICENSED DISPLAY OF FIREWORKS.—During such a display plaintiff's house was set on fire by a rocket and damaged. The display was licensed by the mayor of defendant pursuant to an ordinance on the subject. Defendant had power to regulate the use of

fireworks. Held that the defendant was liable although the city had no power to authorize fireworks where they would be a public nuisance.

3. WHEN CITY LIABLE FOR ACTS ULTRA VIRES.—Where a municipal corporation, having power or jurisdiction over a subject matter, makes a mistake in the exercise of its powers or acts in excess of its powers, and damage results to third persons thereby, it will be liable to make reparation.

ACTION by S. Fleet Speir against the city of Brooklyn for damages for the setting fire to plaintiff's house by fireworks. From a judgment of the general term, 19 N. Y. Supp. 665, affirming a judgment of the special term, 18 N. Y. Supp. 170, in favor of plaintiff, defendant appeals.

One Amantrano obtained a permit from the mayor's office, Brooklyn, for the discharge of fireworks at the corner of Montague and Clinton streets, adjacent to the Academy of Music in that city, which permit recited that it was granted under chapter 3, art. 3, § 2, of the city ordinances. Under this permit, on the night of November 1st, 1887, there was a display of fireworks consisting of rockets, shells, bombs, balloons, and colored fire, conducted by one Bidwell, who had been employed by Amantrano, in the streets at the place mentioned, on the occasion of a political meeting. A copy of the permit was sent from the mayor's office to the chief of police, as was the custom when such permits were granted, and in consequence of the permit the police did not interfere with the display. The display was extensive, and the rockets used were large and powerful. During the display one of the rockets entered the window of plaintiff's house, within 60 or 80 feet from the point where it was discharged, setting fire to the house, and occasioning the damage for which the action was brought. It had been customary for the mayor to grant similar permits for the discharge of fireworks in the streets on occasions of political meetings, under the assumed authority of the ordinance referred to. The city ordinances relative to fireworks are as follows, chapter 3, art. 4, § 2: "No person shall fire or discharge any cannon, gun, pistol, fowling piece or firearm of any description, or store or sell or offer to sell, explode or set off any firecracker, rocket, squib or combustible fireworks of any description, within the city limits; provided, that nothing in this section contained shall be construed to extend to any fireworks exhibited by order of the common council or by any exhibitor who shall

be authorized by a permit from the mayor to exhibit the same for public amusement, under a penalty of twenty-five dollars for each and every offense." Chapter 3, art. 5, § 14: "The use of fireworks of all descriptions is prohibited within the city limits, except on the whole of the fourth day of July in each and every year: provided however, that this section shall not apply to such public displays as may be authorized by the city authorities, or such private displays as may be allowed under permit from the mayor granted for such purpose; and any person violating any of the provisions of this section shall forfeit and pay a sum not exceeding five dollars for each and every such offense." Further facts are stated in the opinion.

Almet F. Jenks, for app't; *William C. De Witt*, for resp't.

ANDREWS, C. J.—The finding of the trial judge that the use of the street for the discharge of fireworks constituted a public nuisance is amply justified, in view of the circumstances. It has been decided in some cases that the discharge of fireworks in the streets of a city or village is a nuisance *per se*, and subjects persons engaged in the transaction to responsibility for any injury to person or property resulting therefrom. *Jenne v. Sutton*, 43 N. J. Law, 257; *Conklin v. Thompson*, 29 Barb. 218. It may be doubted whether the doctrine, in its full breadth, can be maintained. The practice of making the display of fireworks a part of the entertainment furnished by municipalities on occasions of the celebration of holidays or the commemoration of important public events is almost universal in cities and villages; and we are not prepared to say that this may not be done, and that streets and public places may not be used for this purpose, under the supervision of municipal authorities—due care being used both as to the place selected, and in the management of the display—without subjecting the municipality to the charge of sanctioning a nuisance, and the responsibility of wrongdoers. But the circumstances in the present case do not take the transaction in question out of the category of nuisances, or relieve the parties who conducted or promoted the affair from liability for the injury occasioned. The discharge of fireworks in a city under any circumstances is attended with danger. In the present case the

danger was greatly enhanced by the location. It was at the junction of two narrow streets of a large city, completely built upon, and where any misadventure in managing the discharge would be likely to result in injury to persons or property. The display was of considerable magnitude, and the explosives, especially the rockets, were heavily charged, and, when exploded, were carried with immense velocity. It was managed by private persons under no official responsibility, and no municipal or public interest was concerned. Under the circumstances, in view of the place, the danger involved, and the occasion, the transaction was an unreasonable, unwarranted, and unlawful use of the streets, exposing persons and property to injury, and was properly found to constitute a public nuisance.

The judgment below adjudges that the city of Brooklyn is liable for the injury sustained by the plaintiff, and this is the only question in the case. That a municipal corporation may commit an actionable wrong, and become liable for a tort, is now beyond dispute. If the city directed or authorized the discharge of the fireworks which resulted in the injury complained of, it is, we think, liable. The inquiry is whether the city of Brooklyn did anything which, as to this plaintiff, placed it in the attitude of a principal, in carrying on the display. The mayor of the city, its chief executive officer, expressly authorized it, assuming to act, in so doing, under an ordinance of the common council. In so doing, and in construing the ordinance as authorizing him to grant a permit to private persons to use the public streets for the discharge of fireworks, he was following the practice which had long prevailed; and, so far as appears, no question had been raised that such permits were within the ordinance. The permit, when given and communicated to the police, was understood as preventing any police interference with the act permitted, and it had that effect in the case in question. The city had power to prohibit or regulate the use of fireworks within the city, and to enact ordinances upon the subject. The ordinances passed were not *ultra vires*, in the sense that it was not within the power or authority of the corporation to act in reference to the subject under any circumstances. See Dill. Mun. Corp. § 963 et seq. It is the settled doctrine of the courts that a municipality is not bound merely by the assent of its executive officers to wrongful

acts of third persons, nor could the mayor bind the city by a permit, for the granting of which he had no color of authority from the common council, and which was not within the general scope of his authority. *Thayer v. City of Boston*, 19 Pick. 511. If the permit was in fact authorized by the ordinance, the city would, as we conceive, be liable, although the particular act authorized was wrongful. For a mistake in the exercise of its powers, or by acting in excess of its powers, upon a subject within its jurisdiction, whereby third persons sustain an injury, there seems to be no reason, in justice, which should deny the injured party reparation. The common council is the governing body. It represents the corporation, and its acts are the acts of the corporation, when they relate to subjects over which the corporation has jurisdiction. It is true that the power to pass ordinances and to regulate the use of fireworks did not embrace a power to authorize or legalize nuisances. But, if the ordinance transcended the power of the common council in this respect, the misconstruction of the common council of the extent of its powers in dealing with the subject, which was concededly within its power of regulation, does not, we think, within any just view of municipal exemption from the consequences of unauthorized and wrongful acts of the governing body, exempt the city from liability. See *Cohen v. Mayor*, 113 N. Y. 532; 21 N. E. Rep. 700. But it is claimed that the ordinance did not, by its true construction, authorize the mayor to grant permits to use the streets for the discharge of fireworks. The contention is that there is an implied limitation that the permit should extend only to proper and suitable places other than the public streets. But there is no such limitation, in terms, in the ordinances, and the streets are not excepted from the power granted; and the case shows that the ordinance has been acted upon for many years, and has never been construed as now claimed. We are not prepared to say that the legal construction of the ordinance is not that which is now claimed by the counsel for the city, or that there is not to be read into it the limitation claimed. But the ordinance is at least indefinite and ambiguous. It might well be construed by laymen as it has been construed by the executive officers of the city. The ordinance was in fact the reason for the granting of the permit in this case. We think that, as to the plaintiff, who has suf-

ferred the injury, the city is bound by the construction of the ordinance placed upon it by the mayor, which was not only possible, but plausible, and upon which, for years, the mayor had acted. We think the judgment is sustainable, and it should therefore be affirmed.

All concur.*

Municipal corporations. When liable for acts ultra vires.—The subject is discussed in 2 Dill, *Munic. Corp.* §§ 968-970. In *Morrison v. City of Lawrence*, 98 Mass. 219, the suit was for the death of a person, killed by a rocket fired at a fourth of July celebration, being conducted by the officers of the city in their official capacity. The city was authorized by statute to appropriate money for such celebrations, but this could only be done in pursuance of a "vote of two thirds of the members of each branch of the city council present and voting by a yea and nay vote." There was judgment for the defendants because there was no evidence of the fireworks having been authorized by such a vote as the statute required.

UNION PACIFIC R. CO. V. GOODRIDGE.

(Supreme Court of the United States, May 15, 1893.)

1. **RAILROADS AS CARRIERS. UNJUST DISCRIMINATION. CIRCUMSTANCES HELD TO BE NO JUSTIFICATION FOR A DIFFERENCE IN RATES.**—In an action by a shipper to recover damages under a statute forbidding discrimination in freight rates, the railroad company cannot set up in justification of the lower rates a contract with the party in whose favor they were made, whereby, in consideration of the lower rates, such party releases the railroad company from an unexplained, indefinite, and unadjusted claim for damages arising from a tort; for to allow such a defense would practically emasculate the law.

2. In an action by a shipper of coal to recover damages from a railroad company for unlawful discrimination in rates, the railroad company pleaded in defense a certain contract between itself and the coal company in whose favor discrimination was alleged, whereby, in consideration of the release by such company of a certain claim against defendant for damages, and its agreement to furnish coal to defendant for use in its locomotives at cost, or at a maximum price, (which was alleged to have proved less than cost,) defendant agreed to allow a rebate of 40 cents per ton in case the coal company's shipments of coal exceeded 200,000 tons annually. Held that, in the absence of any allegations that the shipments of coal exceeded 200,000 tons annually, this answer constituted no defense.

3. A demurrer to the answer setting up this contract having been properly sustained, all defenses based on the contract were disposed of, and although on the trial of the case the court, without sufficient reason, and against objection, permitted a witness to give oral evidence as to some of the terms of the contract, it was at liberty to put an end to this line of inquiry at

*Reported in 34 N. E. Rep., 727.

any time; and there was no error, therefore, in refusing to allow the witness to state the cost to the favored company of mining coal,—the evident purpose being to show that under the contract coal was furnished to the railroad company for its own use at less than cost, whereby the rebate allowed on shipments was more than overbalanced.

4. MEASURE OF DAMAGES. LOSS OF PROFITS. The measure of damages to a shipper of coal for unlawful discriminations by a railroad company in favor of another coal shipper, similarly circumstanced as to place and distance, is the amount which the complaining party would have received if he had been allowed the same rebate per ton as the favored shipper. The questions whether profits were lost in the sale of coal by reason of the non-allowance of such rebates is too remote to be considered.

THIS was an action at law by the firm of Goodridge & Marfell, coal merchants, carrying on the business of mining coal at Erie, Colo., and of selling the same at Denver, against the Union Pacific Railway Company, to recover triple damages, under a statute of Colorado, for an alleged unjust discrimination in freights upon coal from Erie to Denver.

The statute which was the basis of this action, together with a corresponding clause of the state constitution of Colorado, so far as the same are material to this case, are set forth in the margin.*

* Const. art. 15, § 6: "All individuals, associations and corporations shall have equal rights to have persons and property transported over any railroad in this state, and no undue or unreasonable discrimination shall be made in charges or in facilities for transportation of freight or passengers within the state, and no railroad company, nor any lessee, manager or employee thereof, shall give any preference to individuals, associations, or corporations in furnishing cars or motive power."

Sess. Laws Colo. 1885, p. 309: "Sec 7. Unjust Discrimination. No railroad corporation shall, without the written approval of said commissioner, charge, demand, or receive from any person, company, or corporation, for the transportation of persons or property, or for any other service, a greater sum than it shall, while operating under the classification and schedule then in force, demand or receive from any other person, company, or corporation for a like service from the same place, or upon like conditions and under similar circumstances; and all concessions of rates, drawbacks, and contracts for special rates shall be open to and allowed all persons, companies, and corporations alike, at the same rate per ton per mile, upon like conditions, and under similar circumstances, except in special cases designed to promote the development of the resources of this state, when the approval of said commissioner shall be obtained in writing," etc.

"Sec. 8. Extortion. No railroad corporation shall charge, demand, or receive from any person, company, or corporation an unreasonable price for the transportation of persons or property, or for the handling or storing of freight,

The amended complaint alleged the defendant to be a common carrier, chartered by an act of congress, and operating a line of railroad from Erie and Marshall, at both of which were located certain coal mines, about thirty-five miles to Denver; that if there were any difference in distance it was in favor of Erie, by about two miles, and that the published schedule of freights for coal was the same, namely, \$1 per ton from each place; that plaintiffs, while operating their coal mines from Erie, between October 31, 1885. and August 12, 1887, shipped to Denver 12,960 tons and 1,625 pounds of coal, for which they paid defendant \$12,960 and a fraction, being at the rate of \$1 a ton, believing that such was the regular schedule rate charged the general public and all parties similarly situated for such service, there being no difference or discrimination between such rates as between Erie and Marshall to Denver; that the Marshall Consolidated Coal Mining Company at the same time operated coal mines at Marshall, and was engaged in shipping coal over defendant's road to Denver under the same circumstances as the plaintiffs, except as to rates, and was a competitor with the plaintiffs; that the amount of such shipments was about 145,833 tons, the defendant charging such company sixty cents per ton, and allowing a rebate of forty cents from its schedule rates; that plaintiffs are informed such rebates amounted to upwards of \$58,000, and that the defendant in this manner, without the approval of the railroad commissioner, demanded

or for the use of its cars, or for any privilege or service afforded by it in the transaction of its business as a railroad corporation, and not specified in the classification and schedule prepared and published by such railroad corporation. The superintendent, or other chief executive officer of each railroad in this state, shall cause to be kept posted up, in a conspicuous place in the passenger depot in each station where passenger tickets are kept for sale, a printed copy of the classification and schedule of rates of freight charges then in force on each railroad, for the use of the patrons of the road. Any railroad company violating any of the provisions of this section shall be deemed guilty of extortion, and be subject to the penalties hereinafter prescribed.


"Sec. 9. Penalty. Any railroad corporation that shall violate any of the provisions of this act as to loading points, freight cars, unjust discrimination, or extortion, shall forfeit, in every such case, to the person, company, or corporation aggrieved thereby, three times the actual damage sustained or overcharges paid by the party aggrieved, which triple damages shall be adjudged to be paid, together with the costs of suit, and a reasonable attorney's fee, to be fixed by the court, and taxed with the costs."

and received from the plaintiffs the sum of \$5,184.80 more than it received from the Marshall Consolidated Coal Mining Company (hereinafter called the Marshall Company), for like services, upon like conditions, without the knowledge or consent of the plaintiffs; that the defendant in this manner, and to this extent, allowed the Marshall Company drawbacks or rebates for carrying its coal, which were not open to and allowed all companies and corporations alike, at the same rate per ton per mile; that these rebates were made secretly and clandestinely in favor of the Marshall Company, with the design to deceive and mislead the plaintiffs, and fraudulently conceal from them the facts relating to such rebates, and did so conceal them until about August 12, 1887; and that the plaintiffs were misled and deceived by these devices and practices, and remained in ignorance of the same, until such date.

The plaintiffs further allege that defendant had granted other parties, similarly situated, the same rebates for the carrying of coal over its road from Marshall, and further charged that all the coal shipped by the plaintiffs and the Marshall Company was about the same quality, and cost the defendant the same amount to handle and ship over its lines, and that the charges made by the defendant were unreasonable, unjust, and extortionate; that plaintiffs had demanded of defendant reimbursement of the over charges, which had been refused, by reason of which they asked judgment in the sum of \$15,552.90, being three times the amount alleged to have been extorted, at the rate of forty cents per ton on all coal shipped by them.

The answer set up a general denial of each and every material allegation in the complaint, and special denials that defendant had allowed the Marshall Company a rebate of forty cents per ton, or that it had charged plaintiffs more than it had charged the Marshall Company for like services. For a second defense the defendant alleged that in January, 1880, the Denver, Western & Pacific Railway Company, a Colorado corporation, was engaged in building a railroad from Denver to Boulder, and in so doing passed over certain coal lands belonging to one Langford and others, known as the "Marshall Coal Mine;" that in constructing its line it negligently broke into the mine, in consequence of which it was claimed the mine took fire, and destroyed large amounts of coal, and

continued to burn for several months, to recover which damages suits were instituted by the owners of the mine against the railroad company, which were litigated for several years ; that in addition to such damages the company had failed to obtain a right of way across the mining lands ; that in January, 1882, a judgment was also obtained against the company, in the sum of \$64,000, upon a mechanic's lien, of which judgment the Union Pacific subsequently became the owner, as well as of a large number of the bonds of the said company ; that the road was subsequently sold, and came into the hands of the Union Pacific, and in 1885 a corporation was formed under the name of Denver, Marshall & Boulder Railway Company which was owned and controlled by the Union Pacific, and which proceeded to construct its road from Denver to Boulder, and that the claim against the Denver, Western & Pacific had become, and still remained, a lien upon the property in the hands of the Denver, Marshall & Boulder Company ; that in 1885 the said Langford and others sold the Marshall coal mine to the Marshall Company, which thus became the owner of the mine, and also, by assignment, the owner of the claim for damages done to it by the Denver, Western & Pacific Railway Company ; that in 1885 the Union Pacific was the owner of a certain coal mine at or near Louisville, Boulder county ; that in addition to the liens above stated there was also a bonded indebtedness of about \$1,000,000 upon the Denver, Western & Pacific, secured by a mortgage, which was foreclosed in 1883, and upon such foreclosure the owners of the Marshall coal mine answered, setting up their claim for damages to the extent of \$81,000 ; that the property was subsequently put up, and sold at master's sale, under decree of foreclosure, the rights of Langford and others not being adjudicated at that time, and that upon such sale the title was acquired by parties acting in behalf of the Union Pacific, which had become the owner of a large number of the mortgage bonds ; that for some time prior to October 13, 1885, defendant was receiving coal for its locomotives from the Union Coal-Mining Company, which was the owner or lessee of certain coal mines at Erie and at Louisville, and had been engaged in working the mines, and furnishing the defendant with coal ; that about the same time the Marshall Company had become the owner of the coal lands formerly owned by Langford and others, and that on account of complaints that had been made by the



owners of other mines the defendant concluded that it was for its best interest to discontinue its connection with the Union Coal Company, and for that purpose it entered into negotiations with the Marshall Company for the purpose of inducing this company to take off its hands the mines of the Union Coal Company; that it was further induced to enter into this contract by the fact that the Marshall Company had succeeded to the rights of the former owners of the Marshall coal mines, and to their claim for damages against the Denver, Western & Pacific, and for the purpose of getting rid of the operation of the Union coal mines, and of settling this claim for damages, it entered into a contract with the Marshall Company on the 13th day of October, 1885, in which it was recited that, it being for the interest of the Union Pacific to discontinue the working of the Union coal mine, and to contract with the Marshall Company for all the coal needed for its own consumption on its road and branches, not to exceed 50,000 tons for the first year, and 100,000 tons for every year thereafter, therefore, in consideration of the Union Coal Company going out of the coal business, and the purchase from the Marshall Company by the defendant of the coal used for its own consumption at the rate mentioned therein, and in consideration of the rates for the transportation of coal therein agreed upon, the coal company agreed to furnish from the Marshall mine all coal ordered by the railway company for its own use and consumption, and the use of its branches, not exceeding 50,000 tons for the first year and 100,000 tons per annum thereafter, and to deliver all coal on board of the cars of the Union Pacific at the mouth of the mine, at a price not to exceed \$1.25 per ton, delivered and loaded on the cars, and, if such cost was less than \$1.25 per ton, then at actual cost.

It was further agreed that the defendant should give to the Marshall Company for the transportation of its coal the regular tariff rate, not exceeding \$1 per ton, unless 200,000 tons should be mined and furnished for transportation yearly, in which case a rate of sixty cents per ton should be paid for all coal transported over defendant's line to Denver, and, if the rate were reduced below \$1, then the sixty cent rate should be reduced in the same proportion. It was also provided that, if the railway company should order coal in excess of the amounts of 50,000 and 100,000 tons

per annum, then the railroad company should pay the cost of mining and putting such coal on the cars, plus fifty cents per ton, except that in no case should the price for mining and loading such coal exceed \$1.40 per ton; and it was further agreed that, as part consideration of the contract, the majority of the capital stock of such coal company should for two years be held, in case the company desired to sell it, and should first be offered to the Union Pacific in preference to any other purchaser. This contract was to remain in force for five years.

It was further alleged that from the fact that Mr. Adams, the president of the defendant company, was not intimately acquainted with the claim for damages made by the former owners of the Marshall mines, the contract failed to mention anything about the settlement of said claim, but that the contract was sent to the general attorney of the defendant, with instructions to look it over, and if anything further was needed to settle the controversy that might grow out of anything theretofore existing it should be provided for in a separate instrument, and thereupon the attorney prepared a bond of indemnity for execution by the coal company, reciting the claim for damages against the Denver, Western & Pacific, and agreeing to indemnify the railway company against any damages which might accrue to it by reason of such claim, and upon the execution of such bond, and as part of the transaction, the contract was delivered to the Marshall Company, and afterwards the former owners of said Marshall mines executed and delivered a receipt in full, discharging the defendant from all suits and causes of action existing by reason of any matter or thing pertaining to the construction of the Denver, Western & Pacific Railway Company. The answer further alleged that the defendant was informed and believed that it cost the Marshall Company and would have cost the defendant, if it had continued to operate through the Union Coal Company, at least \$1.60 per ton to mine their coal, and that on account of the settlement of the aforesaid claims, and of the coal necessarily used by it, the Marshall Company has paid the defendant a higher rate, as a matter of fact, than \$1 per ton, although it was not intended that the rate should exceed the schedule price.

To this second defense, which was elaborately set forth in the answer, a demurrer was interposed by the plaintiffs, and sustained

by the court (37 Fed. Rep. 182), to which the defendant duly excepted. Defendant thereupon for a third defense, pleaded the statute of limitations, plaintiffs replied, and the case went to trial before a jury, which returned a verdict for the plaintiffs in the sum of \$5,184.30, for which amount judgment was entered, and defendant sued out this writ of error.

John F. Dillon, Harry Hubbard, Willard Teller, and H. M. Oranhood, for plaintiff in error. *A. J. Sampson*, for defendants in error.

BROWN, J. (after stating the facts)—This case involves the construction of an act of the legislature of Colorado passed in 1885, prohibiting railroads from charging one person or corporation a greater sum than it charges any other for a like service, upon like conditions, and under similar circumstances. The statute is of the same nature as the interstate commerce act, and, like that, was designed to prevent unjust discrimination and extortion in rates for the carriage of persons and property.

1. The first assignment of error is taken to the ruling of the court sustaining the demurrer to the second answer of the defendant, in which it set up certain contracts with the Marshall Consolidated Coal Company, which were claimed to justify the rebate of forty cents per ton allowed to that company from the regular schedule rates, which the plaintiffs were compelled to pay. This defense set forth a very complicated series of facts which, however, are susceptible of a condensed statement. It seems that the defendant, the Union Pacific, was the owner of a large part of the capital stock of the Union Coal Company, and had been for some time receiving from it coal for consumption upon its locomotives, when, on account of certain complaints made by the owners of other mines, it concluded that it was for its best interests to discontinue its connection with this company, and to enter into negotiations with the Marshall Company for its supply of coal. These negotiations resulted in the contract of October 13, 1885, wherein the coal company agreed, on its part—First to furnish the railroad with all coal needed for its consumption, not exceeding 50,000 tons the first year, and 100,000 tons yearly thereafter, and to deliver the same on its cars at the mouth of the mine at cost, but in no case to exceed \$1.25 per ton; second, that in case the railroad should order in excess of the above amount the same should be

furnished at cost, plus fifty cents per ton, but in no case should such cost exceed \$1.40 per ton ; third, that the railroad company should have the option for two years of taking a majority of the capital stock of the coal company , in preference to any other purchaser, should the coal company desire to sell the same.

The railway company, upon its part, agreed to go out of the business of mining coal, and give the coal company the regular tariff rate to Denver of \$1 per ton, unless 200,000 tons were furnished for transportation each year, in which case a rebate of forty cents should be given, with a corresponding reduction in case the regular tariff was reduced below \$1.

There were other subordinate covenants upon both sides, but they are not material to the consideration of this case. This contract was to remain in force for five years.

It is a sufficient reply to the whole defense set up in this part of the answer to say that the coal company was only to be allowed a rebate of forty cents per ton in case it furnished the railroad company 200,000 tons per year for transportation, and there is no allegation in the answer that it ever did furnish this amount, or ever became entitled to the rebate. The want of such allegation is fatal to the contract as a defense, and the court for this reason, if for no other, was right in sustaining the demurrer.

But we think the answer must be held insufficient for another reason. It is further stated that an additional consideration existed for this rebate in certain unliquidated claims for damages which the former owners of the Marshall mines had against the Denver, Western & Pacific Railway Company the original constructors of the road, by reason of their negligently breaking into the mine during the construction of the road, setting it on fire, and thereby consuming a large amount of coal and personal property, for which claim suits were instituted against the railroad company, and litigated at great expense for several years, and were still undetermined. There was also another claim for a right of way for one mile across their lands. These claims, Langford and others, who then owned the mine, sold and assigned to the Marshall Company with the property. The Denver, Western & Pacific Railway, which had done the injury for which the damages were claimed, was itself sold under foreclosure of its mortgage, and bought in by parties acting in the interest of the

Union Pacific, who organized a new corporation, called the Denver, Marshall & Boulder Railway, leaving the claim of the Marshall Coal Company unadjusted and unpaid, and a lien upon the property. How this claim for unliquidated damages for the negligence of the railroad company became a lien upon the property of the company, and how such lien took precedence of the mortgage, and survived the foreclosure and sale of the property, and became a lien upon the road in the hands of the Denver, Marshall & Boulder Company, does not clearly appear; but admitting it to be still valid and outstanding, as alleged in the answer, the question still remains whether the defendant company can set up an unliquidated claim of this kind in defence of a rebate of forty cents per ton allowed the coal company over every other shippers on its road.

It will be observed, in this connection, that not only was the amount of the damages suffered by the coal company never fixed, agreed upon, or adjusted, but the amount of coal which the Marshall Company was at liberty to deliver to the railroad company for transportation was left equally indefinite, save only that it must exceed 200,000 tons per year to entitle it to the rebate. This contract was to remain in force five years; but, upon the theory of the defendant, there was nothing to prevent it being continued indefinitely, provided the defendant company was willing to accede to any amount of damages which the coal company might see fit to claim. While we do not undertake to say that a railroad company may not justify a fixed rebate in favor of a particular shipper by showing a liquidated indebtedness to such shipper which the allowance of the rebate was intended to settle, it would practically emasculate the law of its most healthful feature to permit an unexplained, indefinite, and unadjusted claim for damages arising from a tort, which, though litigated for some time, never seems to have been prosecuted to a final determination in the courts, to be put forward as an excuse for a clear discrimination in rates. This act was intended to apply to intrastate traffic, the same wholesome rules and regulations which congress two years thereafter applied to commerce between the states, and to cut up by the roots the entire system of rebates and discriminations in favor of particular localities, special enterprises, or favored corporations, and to put all shippers on an absolute equality, sav-

ing only a power, not in the railroad company itself, but in the railroad commissioner, to except "special cases, designed to promote the development of the resources of this state," and not to prevent the railroad company "from making a lower rate per ton per mile, in car-load lots, than shall govern shipments in less quantities than car-load lots, and from making lower rates for lots of less than five car loads than for single car-load lots." The statute recognizes the fact that it is no proper business of a common carrier to foster particular enterprises, or to build up new industries; but, deriving its franchise from the legislature, and depending upon the will of the people for its very existence, it is bound to deal fairly with the public, to extend them reasonable facilities for the transportation of their persons and property, and to put all its patrons upon an absolute equality. *Scofield v. Railway Co.*, 43 Ohio St. 571; 3 N. E. Rep. 907; *Sanford v. Railroad Co.*, 24 Pa. St. 378; *Messenger v. Railroad Co.*, 36 N. J. Law, 407; *McDuffie v. Railroad Co.*, 52 N. H. 430. So opposed is the policy of the act to secret rebates of this description that it requires a printed copy of the classification and schedule of rates to be posted conspicuously in each passenger station for the use of the patrons of the road, that every one may be appraised, not only of what the company will exact of him for a particular service, but what it exacts of every one else for the same service, so that in fixing his own prices, he may know precisely with what he has to compete. To hold a defense thus pleaded to be valid would open the door to the grossest frauds upon the law, and practically enable the railroad company to avail itself of any consideration for a rebate which it considers sufficient, and to agree with the favored customer upon some fabricated claim for damages, which it would be difficult, if not impossible, to disprove. For instance, under the defense made by this company, there is nothing to prevent a customer of the road, who has received a personal injury, from making a claim against the road for any amount he chooses, and in consideration thereof, and of shipping all his goods by that road, receiving a rebate for all goods he may ship over the road for an indefinite time in the future. It is almost needless to say that such a contract could not be supported.

There is no doubt of the general proposition that the release of an unliquidated claim for damages is a good consideration for a

promise, as between the parties, and if no one else were interested in the transaction that rule might apply here; but the legislature, upon grounds of public policy, and for the protection of third parties, has made certain requirements with regard to equality of rates, which in their practical application would be rendered nugatory if this rule were given full effect. For this reason we think the railroad company is in error in its assumption that "if, in the honest judgment of the officers of the defendant company who made the contract, the considerations which entered into it, and upon which alone it was made, were sufficient to warrant the company to pay back to the Marshall Company forty cents per ton for each ton it shipped for five years, that is enough." This is but a restatement, in different language, of a comment made by the court below in its opinion, that "the whole answer amounts only to this: that the Marshall Company is allowed less rates than other shippers are required to pay, upon considerations which are satisfactory to defendant; and it is obvious that this is no answer to a complaint of unlawful discrimination." If reasons of public policy dictate that the schedule rates shall be posted conspicuously in each railway station, it is no less important that the customers of the road should have the means of ascertaining whether any departure from such rates in favor of a particular shipper is justified by the facts. Such a method is contemplated by the act, in providing that no discrimination of this kind shall be made without the written approval of the railway commissioner. It was evidently designed to put it in the power of the commissioner to permit such discrimination to be made, possibly, in a case like the present one, if, in his opinion, the circumstances seem to warrant it.

2. The second assignment of error is taken to the admission of certain letters of Taggart and Kimball.

Upon the trial of the case before a jury the plaintiffs gave evidence tending to show that the Jackson Coal Company was operating mines at Canfield, thirty-six miles from Denver, and was charged by defendant one dollar per ton for transportation, and that another railroad company, which ran across the mine, charged the same rate. There was also testimony showing the amount shipped by plaintiffs over defendant's road to have been 12,961 tons, for which they paid one dollar per ton. Plaintiffs thereupon called E. R. Taggart, who resided in Denver, and had been en-

gaged in the coal trade for several years selling the product of the Fox Coal Company, which shipped its coal at the same station as the Marshall Company, and was charged one dollar, and who testified that upon information received by him of the rebate allowed to the Marshall Company, through the proceedings of a commission appointed to investigate the affair, he wrote to the president of the defendant and also to T. L. Kimball, the general traffic manager and official head of the defendant company. The letter to Kimball, with the reply, was objected to upon the ground that, the demurrer to the second answer having been sustained, any statement of the way in which the defendant acted relating to that defense was immaterial, irrelevant, and incompetent, which objection was overruled, and defendant excepted. The letter from Kimball to the witness Taggart purported to be a reply to a letter from Taggart to the president of the road, and stated generally that the contract with the Marshall Company was made under circumstances entirely dissimilar to those existing between the Fox Company and the Union Pacific, and in consideration of the company's furnishing the railroad coal for its own use at not exceeding \$1.25 per ton, and also in compromise and settlement of a claim against the company for some sixty-odd thousand dollars. Taggart's reply thereto, dated August 20, 1887, stated the claim from his standpoint, and that he had been advised by the very highest legal sources that the contract was without warrant, and clearly in violation of law, and further insisted upon his claim for the repayment of forty cents per ton. If there were any objections to the admission of Kimball's letter upon the ground that the letter to which it was a reply was not produced, that objection was met by the production of that letter upon cross-examination,—a letter which appears to have been written July 25, 1887, to Mr. Adams, president of the road at Boston. The witness stood in the same position as the plaintiffs with respect to defendant, and had also brought suit against it to recover the same rebate which had been allowed to the Marshall Company, and which plaintiffs were suing to recover in this case. Assuming the correspondence to have been between different parties, and therefore irrelevant, it is not easy to perceive how it could have prejudiced the defendant, as Kimball's letter was a mere iteration of the defense set up in the answer, and put forward at the trial, and Taggart's reply thereto, if

irrelevant, was not improper, or prejudicial to the defendant. If the witnesses had an oral conversation with Mr. Kimball, the manager of the defendant company, there can be no doubt that such conversation, and the whole of it, would have been admissible, as both Taggart's claim and defendant's stood precisely upon the same footing, and if this demand and refusal, instead of being oral, was by correspondence, it would seem to be equally admissible. As Kimball's letter stated clearly the position of the defendant with regard to both these claims, it is difficult to see how it could be prejudiced by its production.


3. The third, fourth and fifth assignments of error are taken upon the same ground to the action of the court in refusing to allow the witnesses Taggart and Rubridge to testify as to what it cost to get out the coal, and put it on the cars at the Marshall mine, and in ruling out testimony showing that by reason of such cost the Marshall Company actually paid at least one dollar per ton for coal carried by defendant.

At the time witness Taggart was asked this question, the case stood in this position: A demurrer to the second answer of the defendant, setting up its excuses for the rebate, had been sustained, and the case set for trial upon the complaint and the denials,—in other words, upon the general issue. Plaintiffs had shown that they, as well as the Jackson & Fox Coal Company, had paid one dollar per ton, and had shown the rebate paid to the Marshall Company, but the contract had not been put in evidence, though the witness Taggart had sworn that he knew "that defendant set up in bar of plaintiffs' claim a contract that they had with the Marshall Company in consideration of the Marshall Company supplying them with coal at a given price,—much below the price at which they could mine it, or get it out of the mines,—and further, in settlement of an old lawsuit they had;" and the record then states, in a very blind way, that "the witness gave further testimony showing that Kimball's testimony as to its own uses, and not exceeding \$1.25 per ton, which was then costing plaintiffs and others about \$1.50 to mine, and commercial coal at not exceeding \$1.40 per ton, at a time when other producers asked \$1.60 per ton,—that was making a difference of from twenty to twenty-five cents per ton on every ton of coal than what it cost." De-

fendant's counsel here asked : " As a matter of fact, do you know what it did cost to get out a ton of coal, and put it on cars at the Marshall or Fox mine ?" This was clearly immaterial, as it was no excuse for a rebate that the coal cost more or less. The right of a railroad to charge a certain sum for freight does not depend at all upon the fact whether its customers are making or losing by their business.

The next witness, Robert H. Rubridge, who had been the treasurer and assistant secretary of the Marshall Company, testified that from November 1, 1885, to August 1, 1887, there was shipped from the Marshall mine to Denver 67, 863 tons, upon which a rebate of forty cents per ton was allowed. Upon cross-examination he testified that that rebate was allowed in consideration "of our giving an indemnity bond. Our company gave an indemnity bond protecting the Union Pacific from all claims on account of a damage suit against them amounting to about \$65,000, for which they had attachments on some of the rolling stock and ties and half a mile of track of the Denver, Western & Pacific. * * * We were to give them coal at cost for the company's use, but not to exceed at any time \$1.25 per ton, and also to give them coal for commercial use at not exceeding \$1.40 per ton ; that is, for Kansas, but not for Denver." This oral testimony with regard to the contract was objected to by plaintiffs' counsel on the ground that the written contract should be produced,—an objection which was overruled by the court. There was evidently an attempt here to obtain from the witness a statement of so much of the contract as was favorable to the defendant, and at the same time not to put it in evidence, since the contract would show on its face that the coal company was not entitled to any rebate, unless it furnished the railroad company 200,000 tons per annum for transportation,—a far larger amount than it actually did furnish. It further appeared that the contract establishing the price of coal was not lived up to, as the railroad company was paying anywhere from \$1.25 to \$1.75 per ton. The witness was then asked how much it cost to get out coal, and to put it on the cars for the use of the Union Pacific in its engines, and also for its commercial use in Kansas.

The answer to this question, as well as the proposal of the defendant to show by the witness that the cost of getting out the



coal, which they were obliged to furnish the Union Pacific under the contract, was largely in excess of what they got, was properly ruled out. The relations between the defendant and the Marshall Company were fixed by their written contract, and under that contract the railway company was entitled to a certain amount of coal at \$1.25 per ton, regardless of cost, and the Marshall Company was not entitled to a rebate unless they furnished 200,000 tons per annum for shipment. This testimony could only have been offered to show that the company was losing money in furnishing the coal at \$1.25 per ton, and therefore that the discrimination in their favor by the railroad company was not unjust. But the court, having sustained the demurrer to the answer setting up this contract upon the ground that it constituted no defense, could not consistently have permitted the defendant to introduce oral testimony of such contract for the purpose of enabling it to rely upon such stipulations as were thought to be favorable to itself. The witness had stated, in answer to the question why the rebate of 40 cents per ton was allowed, that the consideration for doing this was in writing. Plaintiffs' counsel thereupon objected to the proposed oral evidence of the contract as incompetent; and while this objection, though it seems to us to have been well taken, was not sustained, and the witness was permitted to give certain of its stipulations, the court was at liberty at any time to put a stop to this character of testimony, or to rule out any further questions based upon it. The whole case virtually turned upon the demurrer to that portion of the answer setting up this contract. This demurrer having been sustained, the defendant should not have been allowed, in this indirect way, to obtain the advantage of certain stipulations included in the contract.

4. The sixth assignment, that the court erred in refusing to receive in evidence the release of the Marshall Company to the defendant company, cannot be sustained, for the same reason. This release, a copy of which is given in the record, was given by the Marshall Coal Mining Company, and by Langford and Marshall, the previous owners of the mine, to the defendant railway company, releasing it from "all actions and causes of action, suits, controversies, claims, and demands whatsoever for or by reason of any cause, matter, or thing arising out of the construction of

any railroad across the property of either of us in Boulder and Jefferson counties, Colorado." It is obvious, upon the principles hereinbefore stated, that this release was altogether too vague and general to serve as a basis for making the rebate to the Marshall Company.

After some other testimony as to prices paid by other companies, and of unsuccessful efforts made to ascertain why the Marshall Company was given lower rates than its competitors, the plaintiffs rested. The defendant put in no testimony, and the case was committed to the jury, who returned a verdict for \$5,481.34.

5. The seventh and last assignment of error was to the action of the court in refusing to grant a new trial, and in entering a judgment on the verdict, because there was no sufficient evidence to support the verdict, and especially to sustain it as to the amount of damages. Plaintiffs' evidence had shown that the Marshall Company had been receiving a rebate upon all coal transported by it to Denver, which was not allowed to its competitors in business, and the damages sustained by the plaintiffs were measured by the amount of such rebate, which should have been allowed to them. The question whether they lost profits upon the sale of their coal by reason of the non-allowance of such rebates was too remote to be made an element of their damages. They were entitled to the same terms which the Marshall Company would have received, and damages to the exact extent to which the Marshall Company was given a preference.

There was no error in the action of the court below, and its judgment is therefore affirmed.*

RAILROAD COMPANIES AS COMMON CARRIERS. DISCRIMINATION AT COMMON LAW.

1. The word "discrimination" as applied to railroads.—Mr. Kirkman, in his book on Railway Rates, and Government Control, p. 96, says: "The word 'discrimination,' in modern railway literature and discussion, has become perverted. An improper meaning attaches to it; rightly interpreted, it presupposes the exercise of a discretion at once wise and salutary; the act of dissecting and placing in proper relation the component parts of a subject. For instance, it indicates, when applied to rates, that the necessities of trade, and the equities and rights of all concerned, have been considered. Unfortunately, this the true meaning of the word, no longer attaches to it. It has

*Reported in 149 U. S. 680; 13 S. C. Rep. 970.

been so frequently prefixed with the adjective unjust; that, insensibly, the people have come to attach that qualification to it. To them a discriminative rate is synonymous with an unfair one. The word has thus become misleading." These remarks are undoubtedly correct. Discrimination in the abstract denotes a meritorious act or faculty. As applied to railroad transportation it should indicate a wise and proper distinguishing and noting of differences in traffic and in circumstances and conditions, and the regulating of the charges and service accordingly. But the word has come to mean, in law and in common use, the giving of unjust and undue preferences or advantages, to particular shippers or traffic to the detriment of other shippers and traffic. In Webster the word, as applied to railroads, is defined to be "the arbitrary imposition of unequal tariffs for substantially the same service." But the word is not confined in its application to inequality in rates. It is applied to other matters connected with the service, privileges or accommodations afforded by common carriers. This will abundantly appear from the authorities hereafter cited. Discrimination, then, as commonly understood, both in law and by the general public, may be defined as a preference or favoritism accorded to one and denied or withheld from another by a common carrier in the matter of rates, privileges or accommodations, without any difference in circumstances or conditions to justify it. It is thus synonymous with the phrase "unjust discrimination," as used in statutes and constitutions.

2. The common law as to discrimination by common carriers.

Views of text writers.—In view of the supposed serious conflict of authority upon this subject, we have thought it worth while to present the views of the leading text writers upon the question. It is to be remembered that they have usually given their opinions with all the authorities before them and after having viewed the subject in all its various bearings and relations. We submit these views without further introduction.

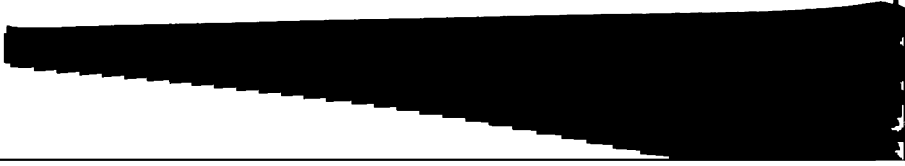
"A railroad company, being under a public obligation as a common carrier, and being in a certain sense a public agent in consequence of holding by delegation the power of eminent domain, is required to treat the public with equality and fairness. It cannot discriminate in the transportation of persons and merchandize by giving special privileges to one which it denies to another, or by charging for the same service higher rates to some than to others." *Pierce on Railroads*, p. 498.

contracts for a less rate may be made in special cases, when, under all the circumstances, the discrimination is reasonable and just. The discrimination must not subject others to unreasonable disadvantages, nor must it be made in order to give one individual a preference, to the disadvantage of another, or to give preference and advantage to one locality to the prejudice of another locality. A mere discrimination in favor of a customer is not unlawful unless it is an unjust discrimination." 1 Wood Ry. Chap. X, § 197, 2d Ed., p. 641. See also 1 Ibid. p. 12, 2 Ibid. p. 1198, 3 Ibid. p. 1671.

"It has been held in this country, where there is no statutory regulation affecting the question, that common carriers are not absolutely bound to charge all customers the same price for the same service. But as the rule is clearly established, at common law, that a carrier is bound by law to carry everything which is brought to him, for a reasonable sum to be paid to him for the same carriage, and not to extort what he will, it would seem to follow that he is bound to carry for all at the same price, unless there is some special reason for the distinction. For, unless this were so, the duty to carry for all would not be of much value to the public, since it would be easy for the carrier to select his own customers at will by the arbitrary discrimination in his favor. Hence, it was held at an early day, that all that could be required on the part of the owner of the goods, by way of compensation, was that he should be ready and willing to pay a reasonable compensation, and to deposit the money in advance if required. Carrying for reasonable compensation must imply that the same compensation is accepted always for the same service, else it could not be reasonable either absolutely or relatively." 2 Redfield R. R. 6 Ed. p. 101. It is proper to say that this quotation is not the language of Judge Redfield, but is in a section added by the editor of the 6th edition of the work referred to.

"The obligation of railroad companies to maintain their roads in operation for the use of the public necessarily implies an obligation not to exact more than reasonable charges and tolls; for otherwise the public might be deprived of the benefits in consideration of which the public aid was granted. It is equally clear that the obligation to carry for the public includes an obligation to carry for all the members of the community without partiality." 2 Mor. Corp. § 1117.

Hutchinson says that the common carrier "is required to carry for all his employers alike. He can show no favors, nor make distinctions which will give one employer an advantage over another, either in the time or order of shipment, or in the distance of the carriage, or in the conveniences or accommodations which may be afforded." Hutch. Carr. § 297. And in reference to discrimination in rates he says: "At the foundation of the whole matter lies the common law rule, just and well settled, that in each particular case there shall be charged a reasonable compensation and no more. In this as in every other case, the question of what is reasonable depends upon the circumstances of each particular case, and this ordinarily becomes a question of fact. A reasonable compensation in each case does not, however, necessarily mean absolute uniformity of rates in all cases. It simply requires that there shall be no unreasonable and hence no unjust discrimination." Hutch. Carr. § 302. In a note, presumably by Mr. Freeman in 11 Am. St. Rep. p. 647, it is said that "it is a general and well established principle of law that a common carrier in



the performance of his public service of transportation, cannot make unjust or unreasonable discriminations between, nor give undue or unreasonable preferences to persons applying to him for the transportation of persons or goods, either in granting carriage to some and not to others, or in carrying for some at less rates than for others."

The same views are supported by 2 Beach Priv. Corp., §§ 407, 833; Cook on Stock, etc., § 674, and 2 Am. & Eng. Enc. Law, pp. 693, 789, 790. Many works upon carriers, railroads and corporations contain no reference to the subject. In none, so far as we have been able to ascertain, are any adverse views expressed, except in Mr. Bennett's edition of Story on Bailments, where it is said: "But at common law a common carrier of goods is not under any obligation to treat all customers equally. He is bound to accept and carry for all, upon being paid a reasonable compensation. But the fact that he charges less for one than for another is only evidence to show that a particular charge is unreasonable; nothing more. There is nothing in the common law to hinder a carrier from carrying for favored individuals at an unreasonably low rate, or even gratis." Story, Bail, § 508a. This is a section added by Mr. Bennett and has not the sanction of Mr. Story's learning and opinion. The only authorities referred to in support of this view are Fitchburg R. Co. v. Gage, 12 Gray, 393 and the *dicta* of Blackburn, J., in Great Western Ry. Co. v. Sutton, L. R. 4 H. L. C. 237, of Byles, J., in Baxendale v. Eastern Counties R. Co., 4 C. B. U. S. 68; 93 E. C. L. R. 68, and of Willes, J., in Branley v. South Eastern R. Co., 13 C. B. U. S. 68; 104 E. C. L. R. 68. These cases will be noticed later on.

3. The common law as to discrimination by common carriers.
Decisions. We present these decisions in the order of the states represented.

California. In Cowden v. Pacific Coast Steamship Co., 94 Cal. 470; 29 Pac. Rep. 873, the defendant operated a line of steamships between San Francisco and San Diego. The declaration alleged that between certain dates the plaintiff, who was a merchant at San Francisco, had shipped certain merchandise over the defendant's line and had paid the regular schedule rates therefor; that between the same dates the defendant had carried for another merchant of the same place, over the same route, goods of the same character and quantity, for a rate 12½ per cent less; and that this was a discrimination against the plaintiff. The declaration was in due form, and sought to recover the difference between what the plaintiff had paid and what he would have paid at the rate charged the second merchant. The trial court sustained a demurrer to the declaration and this judgment was affirmed by the supreme court in banc. The case is decided upon common law grounds. The conflict of authority in this country is referred to and the case of Johnson v. Railroad Co., 16 Fla. 538, is approved and followed. This case is reviewed below. The court then says: "By reason of the variance which exists in the views of the courts of this country as to what is the common law on the subject, it would seem that the adjudications of the common law courts of England upon such a matter should have pre-eminent and controlling weight with the courts of the various states." The court refers to the *dicta* of Blackburn J. in Railway Co. v. Sutton, L. R. 4 H. L. Cas. 258 and of Byles J. in Baxendale v. Railway Co. 4 C. B. N. S. 78, which are hereafter quoted and commented upon, and concludes

as follows: "For the foregoing reason the court concludes that the complaint is deficient in not stating that the charge to plaintiff was unreasonable; and that the allegation of discrimination or inequality is not the equivalent of an allegation of an excessive charge." The point really decided is that the plaintiff cannot recover back any part of the sum he has paid for carriage, unless he has been charged an excessive or unreasonable price, and that the mere showing that someone else has been charged less for the same service, does not establish that the charge against the plaintiff was unreasonable or excessive. The court, however, in its opinion fully sanctions the doctrine that the law obliges the carrier to charge all persons reasonably but not to charge all equally for the same service under the same circumstances.

Colorado. The constitution of Colorado provides that "All individuals, associations and corporations shall have equal rights to have persons and property transported over any railroad in this state, and no undue or unreasonable discrimination shall be made in charges or in facilities for transportation of freight or passengers within the state, and no railroad company, nor any lessee, manager or employe thereof, shall give any preference to individuals, associations or corporations in furnishing cars or motive power." Art. 15, § 6. This was held to be merely declaratory of the common law. *Bayles v. Kansas Pac. R. Co.*, 13 Col. 181. The same view was expressed by the supreme court in *Atchison T. & S. F. Co. v. D. & N. O. R. Co.*, 110 U. S. 667.

In *Bayles v. Kansas Pac. R. Co.* 13 Colo. 181, the plaintiff sued on a contract by which it was agreed that he should ship all his freight over the defendants road for a specified time and pay the schedule rates and should receive back a rebate. The suit was for the rebate. On a demurrer to the declaration the supreme court held that the contract was *prima facie* valid, that it did not appear but what similar contracts were made with others under the same circumstances, or that there were not peculiar circumstances and conditions which justified the rebate. And in reference to the common law principles the court says: "It is a well settled elementary principle of the law of common carriers that mere inequality in charges does not amount to unjust discrimination. The requirement of the law is that the charge made shall be reasonable. A claim against a common carrier cannot be predicated upon the bare fact that the amount paid by one is greater than the amount paid by another. At common law the question is whether, under all the circumstances, the charge is reasonable. Complete uniformity of charges is not obligatory. This principle prevails in all states, except where it has been modified by legislative enactment. In the administration of the law the principle itself has never been modified, but the courts have declared in many cases that there must be no unjust discrimination. This too, has come to be an elementary principle. Charges, therefore, must not only be reasonable, but equal, when the circumstances and conditions are the same. Privileges tending to give a shipper a monopoly, which may injuriously affect those engaged in like pursuit, are declared to be unjust. Contracts which tend to create such preferences are held to be void as against public policy. These principles of the common law remain in full force in practically every state. In this state they are made a part of the organic law, from which neither the courts nor the legislature can depart."

The court here fully commits itself to the doctrine that the charges of a common carrier must not only be reasonable but also equal for the same service under the same circumstances and conditions. Since the foregoing was written a second appeal in the same case has been decided. *Kansas Pacific R. Co. v. Bayles*, 85 Pac. Rep., 744. The same principles are reaffirmed. The court says: "At common law, all shippers stand on an absolute equality with reference to transportation by common carriers, and no such carrier has the right to discriminate in favor of one, as against another."

Florida. In *Johnson v. Pensacola & Perdido R. Co.*, 16 Fla. 628, (1878), a demurrer to pleas was carried back and sustained to the declaration by the supreme court. The declaration alleged that the defendant was a common carrier of lumber and other merchandise, between Perdido bay and Pensacola bay, that between July 1, 1874 and March 1, 1877 it compelled the plaintiff to pay fifty cents per thousand feet on 4,400,000 feet of lumber, shipped by plaintiff over its road, in excess of what it charged the Perdido Bay Lumber Company for like transportation over its road during the same period, and thereby the defendant became indebted to the plaintiff in the sum of \$2200, &c. The case was decided entirely upon common law principles. The reasoning of the court will appear from the following extracts from the opinion: "The cases stating the common law rule are simply that the charge must be reasonable. Thus far there cannot be any reasonable difference between fair minds. In the next place, the right to have the service of the common carrier at a reasonable rate is *common*. Upon a tender of a reasonable compensation, unless there is a reasonable ground for his refusal, in case of refusal he will be liable to an action. Under such circumstances he must receive and carry all goods offered for transportation (which it is his duty to transport,) by *any person whatever*, upon receiving a suitable hire. Looking to the cases, and rejecting as we always must *theories of judges* based upon ill defined definitions and outside of the facts before them, the term 'common' in this connection is used as *contrasted* distinguished to private or exclusive. It means a public carrier as distinguished from a private carrier—a carrier simply *pro hac vice*. As to whether a carrier is public or private is the method by which you measure his responsibility. In case of loss or damage to goods by a carrier, the grounds of the difference of the responsibility depend upon whether he is a public or a private carrier. The cases in England and the United States show that the term common as applied to carriers means simply *public* as distinct from *private*. The term common does not measure the extent of the right of each or its nature. It simply means that whatever is the right of one is the right of all, without proposing to define what is the right of any, except that the term common as applied to carriers involves the duty and obligation to undertake the service, while the term private as applied to carriers involves discretion in the matter. * * *

"Our conclusions are that, as against a common or public carrier, every person has the same right; that in all cases, where his common duty controls, he cannot refuse A., and accommodate B.; that all, the entire public, have a right to the same *carriage for the same price, and at a reasonable charge for the service performed*; that the commonness of the duty to *carry for all*, does not involve a commonness or equality of compensation or charge; that all the shipper can

ask of a common carrier is, *that for the service performed he shall charge no more than a reasonable sum to him*; that whether the carrier charges another more or less than the price charged a particular individual, may be a matter of evidence in determining whether a charge is too much or too little for the service performed, and that the difference between the charges cannot be the measure of damages in any case, unless it is established by proof that the smaller charge is the true reasonable charge, in view of the transportation furnished, and that the higher charge is excessive to that degree. The obligations in this matter must be reciprocal. When there is no express contract, the common law action by the carrier against the shipper is for a *quantum meruit*, and the liability of the shipper is for a reasonable sum in view of the service performed for him. What is charged another person (in this case the amount charged the Perdido Bay Lumber Company,) or the usual charge made against many others (the freight tariff) is matter of evidence admissible to ascertain the value of the service performed. In every case the legality of the charge is established and measured *by the value of the service performed*, and not by what is charged another, unless what is charged another is the compensating sum, in which event it is the proper sum, not on account of its equality, but because of the relation it bears *to the value of the service performed* as an adequate compensation therefor. To sum the whole matter up, the common law is that a common carrier shall not charge excessive freights. It protects the individual from extortion, and limits the carrier to a reasonable rate, and this on account of the fact that he exercises a public employment, enjoys exclusive franchises and privileges, derived, in the case of defendant here, by grant from the state. The rule is not that all shall be charged equally; but reasonably, because the law is for the reasonable charge and not for the equal charge. A statement of inequality does not make a legal cause of action, because it is not necessarily unreasonable. It would be a strange rule indeed, which would authorize a shipper, after being compelled to pay his freights according to established rates to look around and find some smaller charge for the same service during the same time, which may be either as a gratuity, or a sale of service at a non-compensating rate, or less than the reasonable charge, and claim his damages according to this difference, based upon an inequality not general in its character, but existing only by virtue of a charge made for the same service against one other person. If this court sanctions the doctrine of absolute equality, and then measures the charge by the difference in the charge as to one person named in a declaration, which does not negative a fair inducement or consideration for the difference, it must sustain such a rule as that stated.

"The declaration, to be good in law, must state a case of excessive charge for the service performed. Where it simply states a case of inequality of charge, it states no cause of action, for the smaller charge may be less than reasonable, and the greater charge may be exactly the value of the service and the reasonable charge for the transportation furnished. Whether a charge made by A. against B. is reasonable cannot be determined by establishing the charge against C. for the same service. It is too plain for argument that the higher charge, where there is a difference, may be what is the compensating sum, and the lower charge may be too small for the service."

In *Indian Riv. S. S. Co. v. East Coast Trans. Co.*, 28 Fla. 387; 10 So. Rep. 480, it was held that a railroad company having a dock on Indian river, on which its track and terminal facilities were located, could not give to one steamboat company doing business on the river the exclusive right of landing at such dock, and of receiving and delivering freight and passengers to and from its railroad. The cases of *New England Express Co. v. Maine Central R. Co.*, 57 Me. 188; *Express Co. v. Grand Trunk R. Co.*, 81 Me. 93; *Sandford v. Railroad Co.*, 21 Penn. St. 378; *Messenger v. Pennsylvania R. Co.*, 36 N. J. L. 407; 37 N. J. L. 535, and *McDuffee v. Portland & P. R. Co.*, 52 N. H. 480, are quoted from and relied upon, and these are all of them cases in conflict with *Johnson v. Railroad Co.*, 16 Fla. 628, as to the right of carriers to make discriminating rates at common law. The *Johnson* case is not referred to at all.

Indiana. Cleveland, etc., R. Co. v. Closser, 136 Ind. 348; 8 Am. R. R. & Corp. Rep. 686; *Louisville, etc., R. Co. v. Wilson*, 132 Ind. 517; 32 N. E. Rep. 311. The former of these cases can be referred to in these reports. The latter case more fully sanctions the rule of equality as a common law principle. The facts were these: On January 1st, 1887, the defendant raised the freight on railroad ties from certain places on its road to Evansville from \$14 to \$24 per car load. At the same time it made a contract with one, Dickerson, by which it gave him a rate of \$14 per car, in consideration of his agreeing to ship not less than 500 cars per month, and to sell the defendant ties at twenty-five cents each. Plaintiffs afterwards shipped some three hundred and fifty cars and paid the higher rate. The effect, however, of the arrangement with Dickerson was to give him a monopoly of the business. Plaintiffs sued to recover the difference as an overcharge, and a judgment for plaintiffs was affirmed. In course of the opinion the court says: "It is not true that a railroad company, engaged in the business of a common carrier, possesses the same liberty to make contracts for its profit in carrying freight and passengers that a private person engaged in private business possesses in making contracts in relation to private affairs. Railroad companies are granted charters and are given the right of eminent domain, because when the roads are constructed, though owned by the corporation, they are nevertheless for public use, and are, in a qualified sense, public highways. Every one constituting a part of the public for whose use they are constructed is entitled to an equal and impartial participation in the use of the facilities for transportation which they afford. While power to fix rates is conferred upon them by law, such rates are always open to investigation by the courts, for it is an elementary rule that common carriers can charge no more than a reasonable compensation for the services performed. While it is true that there is apparently some conflict in the authorities, the principles here announced, we think, are supported by the weight of authority. *Root v. Railway Co.*, 114 N. Y. 300; 21 N. E. Rep. 408; *Express Co. v. Maine Central R. Co.*, 57 Me. 188; *Scofield v. Railway Co.*, 48 Ohio St. 571; 3 N. E. Rep. 907; *Sanford v. Railway Co.*, 24 Penn. St. 378; *Hayes v. Pennsylvania Co.*, 12 Fed. Rep. 309; *Attorney General v. Railway Co.*, 35 Wis. 426; *Samuels v. Railway Co.*, 31 Fed. Rep. 57; *Providence Coal Co. v. Prov. & W. R. Co.*, 1 Int. St. Com. 107. A writer on railway law thus expresses the general rule: 'Railways are held

to the strictest impartiality in the conduct of their business, in withholding all privileges or preferences from one customer which are not extended to all others,' 1 Wood Ry. Law, 565."

Illinois. The Illinois cases have mostly been decided under statutes. The opinion is frequently expressed in the cases that all unjust, unreasonable and arbitrary discriminations are forbidden by the common law. "Another well settled rule of the common law in regard to carriers is that they shall not exercise any unjust and injurious discrimination between individuals in their rates of toll." *Chicago & A. R. Co. v. People*, 67 Ill. 11, 17. "Unjust discrimination by common carriers was not sanctioned by the common law." *Indianapolis, etc., R. Co. v. Ervin*, 118 Ill. 250, 255. In *St. Louis, etc., R. Co. v. Hill*, 14 Ill. App. 579, 584, 585, which is a carefully considered case by the appellate court it is said: "There is some conflict in the authorities as to the extent to which the common law rule goes in prohibiting discrimination by common carriers. They all agree, that all discriminations are not forbidden, but only those that are unreasonable and unjust. They also all agree, that as they are carriers for hire indifferently for all persons, there are some discriminations they may not make, and they are required to serve all who properly apply for transportation, and in the order of their applications. The point of friction in the authorities is, as to whether the common law rule against unjust and arbitrary discriminations requires an equality of charge. Some of the courts hold, in substance, that all have a right to the same carriage and at a reasonable price for the service performed, but that the commonness of the duty to carry for all, does not involve a commonness or equality of charge; and that all the shipper can ask the carrier is that he shall charge him no more than a reasonable sum. *Fitchburg R. R. Co. v. Gage*, 12 Gray, 393; *Johnson v. P. & P. R. Co.*, 16 Fla. 623. The English authorities are to the effect that at common law the common carrier is not bound to carry at equal rates for all customers in like condition; and the English cases to the contrary cited by the appellees, are based either upon some general or special statute. However, the decided weight of American authority holds, that the common law requires that the charges must be equal to all for the same service of transportation under like circumstances. *Sandford v. R. R. Co.*, 24 Penn. St. 378; *Shipper v. Penn. Co.*, 47 Penn. St. 388; *Ragan v. Aiken*, 9 Am. & Eng. Ry. Cas. 201; *Messenger v. Penn. R. Co.*, 36 N. J. L. 407; *Vincent v. C. & A. R. Co.*, 49 Ill. 33; *C. & N. W. R. Co. v. People*, 56 Ill. 365; *C. & A. R. Co. v. People*, 67 Ill. 11. The common law rule as announced in these cases is an inhibition of a different compensation from various persons for the same or an identical service under identical conditions. In *Smith's Leading Cases*, p. 174, the rule is stated by him to be that the hire charged must be no more than a reasonable remuneration to the carrier, and, consequently, not more to one than to another for the same service."

See also *Vincent v. Chicago & A. R. Co.*, 49 Ill. 33; *People v. Chicago & A. R. Co.*, 55 Ill. 111; *C. & N. W. R. Co. v. People* 56 Ill. 365; *Great Western R. Co. v. Burns*, 60 Ill. 294; *T. W. & W. R. Co. v. Elliott*, 76 Ill. 67; *Erie & Pacific Dispatch Co. v. Cecil*, 112 Ill. 180; *Illinois Central R. Co. v. People*, 121 Ill. 304; *Chicago, etc., R. Co. v. Suffern*, 129 Ill. 274; *Illinois, etc., R. Co. v. Beard*, 34 Ill. App. 322; *Louisville, etc., R. Co. v. Crown Coal Co.*, 43 Ill. App. 228.

Iowa. In *Cook v. Chicago, etc., R. Co.*, 3 Am. R. R. & Corp. Rep. 550, the suit

was brought to recover back excessive charges paid by the plaintiffs on shipments of live stock. The plaintiffs had paid schedule rates but the defendant had discriminated in favor of other shippers by allowing them a secret rebate. The suit was sustained on common law principles. After quoting from Story, Wood, Redfield and Hutchinson, the court says: "An examination of the authorities cited by these learned authors, leaves no doubt that a common carrier has no right to make unreasonable charges for his services, and that he cannot lawfully make unjust discrimination between his customers." A difference in rates for which there is no good reason is held to be an unjust discrimination. The case in effect holds that the common law enjoins equality, except when there are differences in the circumstances or conditions. See, also, *Marsh v. Chicago, R. I. & P. R. Co.*, 79 Iowa, 332; 44 N. W. Rep. 562.

Kentucky. See *McConnell v. Pedigo*, 5 Am. R. R. & Corp. Rep. 711.

Louisiana. In *Eclipse Towboat Co. v. Pontchartrain R. Co.*, 24 La. Ann. 1, the opinion, in effect, approves the doctrine, as to the common law, laid down in *Fitchburg R. Co. v. Gage*, 12 Gray, 393, hereafter referred to. The defendant operated a short railroad from New Orleans to Lake Pontchartrain. The point decided was that the company might lawfully enter into a contract with a steamboat company running to Mobile to make a through rate from New Orleans to Mobile and refuse to do so with any other steamboat line, though the rates thus received by the defendant under such contract were much less than the regular local rate charged to all others. Talliaferro, J., dissented.

Maine. The case of *New England Express Co. v. Maine Central R. Co.*, 57 Me. 188, arose under a statute requiring railroad companies to give all persons engaged in the express business reasonable and equal terms, facilities and accommodations, for the transportation of their agents and merchandise. Prior to the passage of the statute the railroad company had made a contract with the Eastern Express Company by which it gave the latter the exclusive right of doing an express business on its road for four years. The contract had not expired, and it was claimed that the statute could not be applied so as to impair the obligation of the contract. But the court held that the contract was void at common law because it made an unjust discrimination in favor of the Eastern Express Company. The court goes at length into the common law duties of carriers and, among other things, says: "Common carriers are bound to carry indifferently, within the usual range of their business, for a reasonable compensation, all freight offered, and all passengers who may apply. For similar equal services they are entitled to the same compensation. All applying have an equal right to be transported, or to have their freight transported, in the order of their application. They cannot legally give undue and unjust preferences, or make unequal and extravagant charges. Having the means of transportation, they are liable to an action, if they refuse to carry freight or passengers without just ground for such refusal. * * * The very definition of a common carrier excludes the idea of a right to grant monopolies or to give special and unequal preferences. It implies indifference as to whom they serve, and an equal readiness to serve all who may apply, and in the order of their application. The defendants derive their chartered right from the state. They owe an equal duty to each citizen. They are allowed to impose a toll, but it is not to be so im-

posed as specially to benefit one and injure another. They cannot, having the means of transporting all, select from those who may apply, some whom they will, and reject others whom they can, but will not carry. They cannot rightfully confer a monopoly upon individuals or corporations. They were created for no such purpose. They may regulate transportation, but the right to regulate gives no authority to refuse, without cause, to transport certain individuals and their baggage or goods, and to grant exclusive privileges of transportation to others. The state gave them a charter for no such purpose. Such is the common law on the subject." See also *International Express Co. v. Grand Trunk R. Co.*, 81 Me. 92; *Railroad Comrs. v. P. & O. C. R. Co.*, 63 Me. 269.

Massachusetts. One of the earliest cases on the subject is that of *Fitchburg R. Co. v. Gage*, 12 Gray, 398, (1859). The railroad company sued to recover freight charges for the transportation of ice. The defense was that the defendants were entitled to a deduction from the rate charged, and to a set-off on account of overcharges already paid. The defendants contended, and offered to prove, "that while the plaintiffs were transporting the ice they were at the same time hauling over the same portion of their road various quantities of bricks for other parties; that ice and bricks were of the same class of freight, and that ice was as low a class of freight as bricks in regard to the risk and hazard of transportation; and that while they charged the defendants fifty cents per ton for the transportation of ice, they charged other parties only twenty cents per ton for a like service in reference to bricks." This evidence was ruled out, and the ruling was sustained by the supreme court. There was no statute which applied and the case was decided according to the common law, in reference to which the court says: "The principle derived from that source is very plain and simple. It requires equal justice to all. But the equality which is to be observed in relation to the public and to every individual consists in the restricted right to charge, in each particular case of service, a reasonable compensation and no more. If the carrier confines himself to this, no wrong can be done, and no cause afforded for complaint. If, for special reasons, in isolated cases, the carrier sees fit to stipulate for the carriage of goods and merchandise of any class for individuals for a certain time or in certain quantities for less compensation than what is the usual necessary and reasonable rate, he may undoubtedly do so without thereby entitling all other persons and parties to the same advantage and relief. It could, of course, make no difference whether such a concession was in relation to articles of the same kind or belonging to the same general class as to risk and cost of transportation. The defendants do not deny that the charges made on them for the transportation of their ice was according to the rates established by the directors of the company, or assert that the compensation claimed is in any degree excessive or unreasonable. Certainly then the charges of the plaintiffs should be considered legal as well as just; nor can the defendants have any real or equitable right to insist upon any abatement or deduction, because for special reasons, which are not known, and cannot, therefore, be appreciated, allowances may have been conceded in particular instances, or in reference to a particular series of services to other parties."

At the same time the court decided another case, which was heard with the

former, and was a suit to recover for the transportation of ice, and like the other in all respects, except that the offer was to prove that the rate charged the defendants was more than that charged other parties for transporting ice over the same portion of the plaintiff's road during the same time. This evidence was rejected, and the ruling sustained. *Fitchburg R. Co. v. Tudor*, 12 Gray, 899 note.

This view of the common law was confirmed in *Spofford v. Boston & Me. R. Co.*, 123 Mass. 326, which, however, was decided under a statute. See also *Commonwealth v. Eastern R. Co.*, 108 Mass. 254, 258; *Sargent v. Boston & Lowell R. Co.*, 115 Mass. 416.

Michigan. In *Kalamazoo Hack & Bus Co. v. Sootsma*, 84 Mich. 194; 47 N. W. Rep. 667, it appeared that a railroad company had undertaken to give to the plaintiff certain exclusive privileges at its station in Kalamazoo, in connection with the operation of a hack and 'bus line. The court held that the company was precluded from doing so both by the common law and by statute. The plaintiff sued the defendant, who was a business rival, for an interference with his exclusive privileges. In course of the opinion the court says: "But independently of the statute, upon principle, the plaintiff could not recover in this case. A railroad can make all needful, reasonable rules and regulations concerning the use of its depots and grounds, and can exclude all persons therefrom who have no business with the railroad or passengers going to and coming from the trains and depots, and probably can prohibit all persons from soliciting business for themselves upon its premises, but it cannot, arbitrarily, admit one common carrier of passengers or freight to its depots or grounds, and exclude all others, for no other reason than that it is for its own profit or pleasure. *Such rules and regulations must touch and affect all alike*."

Missouri. In *Christie v. Missouri Pac. R. Co.*, 94 Mo. 458, the doctrines enunciated in *Scofield v. Railroad Co.*, 43 Ohio St. 571, which is referred to at length below, are stated, and it is held that they have their foundation in the common law, and that the Missouri statutes on the subject are but declaratory of the common law. To same effect is *McNees v. Missouri Pac. R. Co.*, 23 Mo. App. 224.

Montana. *Montana Union R. Co. v. Langlois*, 9 Mont. 419; 24 Pac. Rep. 209. This case is similar to the Michigan case previously noted and was decided the same way. Discrimination between hackmen, expressmen, &c., was held to be forbidden by "sound reason, public policy, and the general principles of law governing common carriers, as well as the provisions of the constitution." There is an extended reference to this case in 7 Am. R. R. & Corp. Rep. p. 716.

Nebraska. See *State v. Republican Valley R. Co.* 17 Neb. 647; *State v. Missouri Pac. R. Co.*, 3 Am. R. R. & Corp. Rep. 82.

New Hampshire. In *McDuffee v. Railroad Co.*, 52 N. H. 480 the plaintiff sued for damages for the refusal of the defendant to afford him facilities for doing an express business, reasonably equal to those furnished the Eastern Express Co. The suit was sustained. The court held that a common carrier is a public carrier and exercises a sort of public office. "He is under a legal obligation; others have a corresponding legal right. His duty being public,

the correlative right is public, the public right is a common right, and a common right signifies a reasonably equal right." The common law duties of carriers are extensively discussed and we quote from the opinion as follows:

"Equality, in the sense of freedom from unreasonable discrimination, being of the very substance of the common right, an individual is deprived of his lawful enjoyment of the common right when he is subjected to unreasonable and injurious discrimination in respect to terms, facilities or accommodations. That is not, in the ordinary legal sense, a public highway, in which one man is unreasonably privileged to use a convenient path, and another is unreasonably restricted to the gutter; and that is not a public service of common carriage, in which one enjoys an unreasonable preference or advantage and another suffers an unreasonable prejudice or disadvantage. A denial of the entire right of service by a refusal to carry, differs if at all, in degree only, and the amount of damage done, and not in the essential legal character of the act, from a denial of the right in part by an unreasonable discrimination in terms, facilities, or accommodations," p. 450.

"The question of reasonableness of price may be something more than the actual cost and value of service. If the actual value of certain transportation of one hundred barrels of flour, affording a reasonable profit to the carrier is one hundred dollars; if, all the circumstances that ought to be considered being taken into account, that sum is the price which ought to be charged for that particular service; and if the carrier charges everybody that price for that service, there is no encroachment of the common right. But if, for that service, the carrier charges one merchant one hundred dollars, and another fifty dollars, the common right is as manifestly violated as if the latter were charged one hundred dollars, and the former two hundred. * * * A service or price that would otherwise be reasonable, may be made unreasonable by an unreasonable discrimination, because such a discrimination is a violation of the common right. * * * The common and equal right is to reasonable transportation service for a reasonable compensation. Neither the service nor the price is necessarily unreasonable because it is unequal, in a certain narrow, strict, and literal sense; but that is not a reasonable service, which is unreasonably unequal. The question is not merely whether the service or price is absolutely unequal in the narrowest sense, but also whether the inequality is unreasonable and injurious. There may be acts of charity; there may be different prices for different kinds or amounts of service; there may be many differences of price and service, entirely consistent with the general principle of reasonable equality which distinguishes the duty of the common carrier in the legal sense, from the duty of a carrier who is not a common one in that sense. * * * If an apparent discrimination turns out, on examination, to have been, not a discrimination in the performance of the public duty, but a private charity, there is an end of the case. But if an apparent discrimination is found to have been a real one, the question is whether it was reasonable, and, if unreasonable, whether the party complaining was injured by it," p. 453.

This case was disposed of on demurrer to the declaration. The declaration was held good in substance but certain amendments were suggested in order to avoid all possible question. There was a statute in force requiring that all

persons should have reasonable and equal terms, facilities and accommodations for the transportation of themselves, their agents, and servants, and of any merchandise and other property, upon any railroad owned and operated in the state, but this was held to be merely declaratory of the common law and the action is sustained, rather upon common law principles, than under the statute. See especially p. 459. See also *Concord & P. R. Co. v. Forsaith*, 59 N. H. 122.

New Jersey. The subject has received very elaborate consideration in this state. In *Messenger v. Pennsylvania R. Co.*, 36 N. J. L., 407, the plaintiffs sued upon a contract by which they were to receive on all live stock shipped by them from Chicago and Pittsburg to New York, a specified sum less than the regular tariff rates and less than the lowest rate given to any other shipper. The supreme court held that the contract was against public policy and void, that by the common law common carriers were bound to carry for all alike and that the rule of equality applied as well to charges as to other matters in the service. Bearsley, C. J., says:

"The law that forbids him to make any discrimination in favor of the goods of A. over the goods of B., when the goods of both are tendered for carriage, must, it seems to me, necessarily forbid any discrimination with respect to the rate of pay for the carriage. I can see no reason why, under legal rules, perfect equality to all persons should be exacted in the dealings of the common carrier, except with regard to the amount of compensation for his services. The rule that the carrier shall receive all the goods tendered, loses half its value as a politic regulation, if the cost of transportation can be graduated by special agreement so as to favor one party at the expense of others. Nor would this defect in the law, if it existed, be remedied by the principle which compels the carrier to take a reasonable hire for his labor, because, if the rate charged by him to one person might be deemed reasonable, by charging a lesser price to another for similar services, he disturbs that equality of rights among his employers which it is the endeavor of the law to effect. Indeed, when a charge is made to one person, and a lesser charge for precisely the same offices, to another, I think it should be held that the higher charge is not reasonable."

It was further held that railroad companies were invested with a public character by the manner and purposes of their creation, and with important prerogatives and franchises, and in reference to these it is said: "In the use of such franchises, all citizens have an equal interest and equal rights, and all must, under the same circumstances, be treated alike. It cannot be supposed that it was the legislative intention, when such privileges were given, that they were to be used as private property, at the discretion of the recipient, but, to the contrary of this, I think an implied condition attaches to such grants, that they are to be held as a *quasi* public trust for the benefit, at least to a considerable degree, of the entire community. In their very nature and constitution, as I view this question, these companies become, in certain aspects, public agents, and the consequence is, they must, in the exercise of their calling, observe to all men, a perfect impartiality."

The case was affirmed by the court of errors and appeals upon all the grounds taken in the opinion of BEASLEY, C. J., in the supreme court. Mes-

senger v. Pennsylvania R. Co., 87 N. J. L. 531. In the opinion in the higher court it is said: "The business of the common carrier is for the public, and it is his duty to serve the public indifferently. He is entitled to a reasonable compensation, but on the payment of that he is bound to carry for whoever will employ him, to the extent of his ability. A private carrier can make what contract he pleases. The public have no interest in that, but a service for the public necessarily implies equal treatment in its performance, when the right to the service is common. Because the institution, so to speak, is public, every member of the community stands on an equality as to the right to its benefit, and, therefore, the carrier cannot discriminate between individuals for whom he will render the service. In the very nature, then, of his duty and of the public right, his conduct should be equal and just to all. So, also, there is involved in the *reasonableness* of his compensation the same principle. A want of uniformity in price for the same kind of service under like circumstances is most unreasonable and unjust, when the right to demand it is common. It would be strange if, when the object of the employment is the public benefit, and the law allows no discrimination as to individual customers, but requires all to be accommodated alike as individuals, and for a reasonable rate, that by the indirect means of unequal prices some could lawfully get the advantage of the accommodation and others not. A direct refusal to carry for a reasonable rate would involve the carrier in damages, and a refusal, in effect, could be accomplished by unfair and unequal charges, or if not to that extent, the public right to the convenience and usefulness of the means of carriage could be greatly impaired. Besides, the injury is not only to the individual affected, but it reaches out, disturbing trade most seriously. Competition in trade is encouraged by the law, and to allow anyone to use means, established and intended for the public good, to promote unfair advantages among the people and foster monopolies, is against public policy and should not be permitted."

* * * * *

"I certainly agree with the chief justice that, in the grant of a franchise of building and using a public railway, that there is an implied condition that it is held as a *quasi* public trust, for the benefit of all the public, and that the company possessed of the grant must exercise a perfect impartiality to all who seek the benefit of the trust. It is true that these railroad corporations are private, and, in the nature of their business, are subject to and bound by the doctrine of common carriers, yet, beyond that, and in a peculiar sense, they are entrusted with certain functions of the government in order to afford the public necessary means of transportation. The bestowment of these franchises is justified only on the ground of the public good, and they must be held and enjoyed for that end. The public good is common, and unequal and unjust favors are entirely inconsistent with the common right. So far as their duty to serve the public is concerned, they are not only common carriers, but public agents, and in their very constitution and relation to the public, there is necessarily implied a duty on their part, and a right in the public, to have fair treatment and immunity from unjust discrimination. The right of the public is equal in every citizen, and the trust must be performed so as to secure and protect it."

Three judges concurred in this decision in the supreme court and nine judges in the court of errors and appeals and there were no dissents. The same doctrines were approved and applied in *Atwater v. Delaware, L. & W. R. Co.*, 48 N. J. L. 55, in which the court says: "At this day it would be superfluous to enter upon a discussion to support the doctrine, so well settled, that common carriers are public agents, transacting their business under an obligation to observe equality towards every member of the community, to serve all persons alike, without giving any unjust or unreasonable advantages by way of facilities for the carriage or rates for transporting them." Compare *Stewart v. Lehigh Valley R. Co.*, 38 N. J. L. 505.

New York. The cases in this state are not very decisive, and, as said by the court of appeals in the case first cited, are "exceedingly meager." In *Root v. Long Island R. Co.*, 114 N. Y. 800, the suit was upon a contract between one Quintard and the defendant company by which the former agreed to construct upon the lands of the company a dock and coal pocket, of which the defendant was to have the use of a part. In consideration of this, the defendant agreed to transport coal for Quintard in carload lots at a rebate of fifteen cents a ton from tariff rates, to give Quintard the use of certain yard room and office room, and at the expiration of the contract to purchase the structures at an appraised valuation. The contract was to continue for ten years. Quintard constructed the dock and pocket at an expense of \$17,000, and he, and his assignee shipped large quantities of coal in pursuance of the contract. The contract did not provide for the shipment of any specified quantity of coal, nor did it provide that no similar rebate should be given to others. The suit was for the rebates and the defense was that the contract was against public policy and void. The plaintiff recovered a judgment. The court of appeals held that the law forbids unjust discrimination, that whether the contract in question was such a discrimination was a question of fact, that as this fact had not been found by the court below, the judgment must be affirmed, unless the facts were such that the contract could be pronounced an unjust discrimination as a matter of law, and on this point held, that, under all the circumstances, the question was one of fact and not of law. The court says:

"In determining the duty of a common carrier, we must be reasonable and just. The carrier should be permitted to charge a reasonable compensation for the goods transported. He should not, however, be permitted to unreasonably or unjustly discriminate against other individuals to the injury of their business where the conditions are equal. So far as is reasonable all should be treated alike, but we are aware that absolute equality cannot in all cases be required, for circumstances and conditions may make it impossible or unjust to the carrier. The carrier may be able to carry freight over a long distance at a less sum than he could for a short distance. He may be able to carry a large quantity at a less rate than he could a smaller quantity. The facilities for loading or unloading may be different in different places, and the expenses may be greater in some places than others. Numerous circumstances may intervene which bear upon the cost and expenses of transportation, and it is but just to the carrier that he be permitted to take these circumstances into consideration in determining the rate or amount of his compensation. His charges must, therefore, be reasonable, and he must not unjustly discriminate against others, and

in determining what would amount to unjust discrimination all the facts and circumstances must be taken into consideration. This raises a question of fact which must ordinarily be determined by the trial court."

See also *Killmer v. New York Central etc., R. Co.*, 100 N. Y. 395; *Wibert v. New York & Erie R. Co.*, 12 N. Y. 245; *People v. Railroad Co.*, 103 N. Y. 95; *People v. Railroad*, 104 N. Y. 58.

Ohio. The case of *Scofield v. Railroad Co.*, 43 Ohio St. 671, contains a very elaborate review of authorities and concludes in favor of the proposition that common carriers are bound by the common law to give equal rates to all for a like service. The same view is fully sustained by the subsequent cases of *State ex rel. etc. v. Cincinnati, etc. R. Co.*, 47 Ohio St., 130; 2 Am. R. R. & Corp. Rep. 106 and *Brundred v. Rice*, 49 Ohio St. 640; 7 Am. R. R. & Corp. Rep. 357. As these cases are reported in the series, they need not be referred to at length. In the former case, in speaking of the duty of the defendants, it is said: "as common carriers, their duty is to carry indifferently for all who may apply, and in the order in which the application is made, and upon the same terms."

Pennsylvania. In *Sandford v. Railroad Co.*, 24 Penn. St., 378, it appeared that the defendant railroad company had made a contract with the International Express Company, giving it the exclusive right to carry on an express business on its lines for three years. The plaintiff filed a bill against both companies to compel a cancellation of the contract and prevent the granting of exclusive privileges to any. A decree was rendered in accordance with the bill. The court says: "But, wherever a charter is granted for the purpose of constructing a railroad, and the corporation is clothed with the power to take private property, in order to carry out the object, it is an inference of law from the extent of the power conferred, and the subject matter of the grant, that the road is for the public accommodation. The right to take tolls is the compensation to be received for the benefits conferred. If the public are entitled to these advantages, it results from the nature of the right that the benefits should be extended to all alike, and that no special privileges should be granted to one man or set of men, and denied to others. * * * If it possessed this power it might build up one set of men and destroy others; advance one kind of business and break down another; and might make even religion and politics the tests in the distribution of its favors. Such a power in a railroad corporation might produce evils of the most alarming character. The rights of the people are not subject to any such corporate control. Like the customers of a grist-mill they have the right to be served, all other things being equal, in the order of their applications. A regulation, to be valid, must operate on all alike: If it deprives any persons of the benefits of the road, or grants exclusive privileges to others, it is against law and void."

In the case of *Borda v. Railroad Company*, 141 Penn. St. 484 (1891), which was decided in the first instance by a referee, whose conclusion was affirmed by the supreme court, the referee says: "I regard it then as the settled law of this state, that a railroad company, a common carrier, owes a duty of equality to every citizen; and I adopt the position taken by Mr. Bullitt in argument that railroad companies have no right to make any undue discrimination or preference in their charges, and a charge made to one shipper higher than another,

for the same service, under like circumstances, constitutes undue preference and discrimination, and, by consequence, renders the charge unreasonable. Such is the general rule, and it is vastly important to the general rule that there be no undue relaxation of this rule; for, exercising, as they practically do, a monopoly of transportation on their roads, railway managers have in their hands a tremendous power, by discrimination, to enrich one man and ruin another. The equality, however, which is thus prescribed is not a strict and literal equality under all circumstances, however varying and different. It is rather an equality in the sense of freedom from unreasonable discrimination. It is only unjust, undue or unreasonable discrimination against which the law has set its canon. Arbitrary discrimination is illegal; is discrimination made with a view to giving advantage to one person. But the truism that circumstances alter cases applies here, and under a different state of circumstances a discrimination may be reasonable and lawful, which, were the circumstances the same, would be undue and unreasonable. In order to render lawful an inequality of charge, the goods must be carried under different circumstances, and the question whether the difference is material or essential arises in each particular case."

In the still more recent case of *Hoover v. Pennsylvania R. Co.*, 27 Atl. Rep. 282 (1893), this language is quoted and approved, Green, J., saying of it: "The writer regards the foregoing as the most precise and the most felicitous expression of the law upon the general subject under consideration that he has met with, and therefore quotes it entire." In both these cases the discrimination was upheld, the difference in circumstances and conditions being found to justify it. We shall refer to them in a subsequent note.

Other Pennsylvania cases bearing upon the subject are the following: *Commonwealth v. Del. & Hud. Canal Co.*, 48 Penn. St. 295; *Shipper v. Pennsylvania R. Co.*, 47 Penn. St. 338; *Cumberland Valley R. Co.'s appeal*, 62 Penn. St. 218; *Audenreid v. Phila. & Reading R. Co.*, 68 Penn. St. 370; *Munhall v. Pennsylvania R. Co.*, 92 Penn. St. 150; *Sharpless v. Philadelphia*, 21 Penn. St. 147.

South Carolina. The case of *Ex parte Benson & Co.*, 18 S. C. 38, was a petition to have certain rebates paid by the receiver of the Greenville & Columbia R. Co. The petitioners were buyers of cotton at Hartwell, Georgia, which was across the Savannah river from the terminus of the railroad. The superintendent of the road, in order to induce Benson & Co. to ship their cotton over his road, instead of down the Savannah river, proposed to them that if they would ship all cotton purchased by them in Hartwell, during the season of 1877-78, over the road in question and pay the regular tariff rates therefor, the company would, at the end of the season, refund to them the sum of one dollar per bale on all cotton so shipped. Benson & Co. accepted the proposition, complied with it, and the petition was to compel the receiver to comply with the contract. It appeared that the natural outlet for the cotton was down the river and that in order to secure the freight it was necessary to make the rebate. The trial court held that the contract was against public policy and for that and other reasons dismissed the petition. The supreme court reversed this judgment and held that the claim should be paid out of the funds in the hands of the receiver. The case turned upon the common law and after referring to

authorities the court says: "As extracted from these authorities, and many others which might be cited, the extent of the common law rule seems to be, not that carriers shall transport for all parties at the same rate of compensation, otherwise their contracts are illegal and void, but that they shall transport at reasonable rates to all. A difference in charge does not *per se* invalidate the contract as inequitable and against public policy; but to have this effect there must be an element of unreasonableness in the charge itself, as applied to the services rendered, between the parties to the contract and without comparison to the charges against others."

Tennessee. In *Ragan v. Aiken*, 9 Lea, 609, the defendant was proprietor of a railroad fifteen miles in length, which he had acquired by foreclosure proceedings. The plaintiff did a general merchandising business at Rogersville, one terminus of the road. He had been charged and had paid from 20 to 25 cents per 100 lbs. freight on merchandise. At the same time the defendant had carried for others, who resided at a distance from Rogersville, and were not in competition with the plaintiff for 15 cents per 100 lbs. The suit was to recover back a portion of the charges paid. The lower charge was necessary in order to secure the business of the other parties which would otherwise have taken other routes. The court held that unreasonable discrimination was forbidden by the common law and that statutes prohibiting such discrimination were merely declaratory, but that the discrimination in this case was reasonable under the circumstances. "If the charge upon the goods of the party complaining," says the court, "is reasonable, and such as the company would be required to adhere to, as to all persons in like condition, it may, nevertheless, lower the charge of another person if it be to the advantage of the company, not inconsistent with the public interest, and based on a sufficient reason."

Texas. In *Houston & T. C. R. Co. v. Rust*, 58 Tex. 98, which was a suit for unjust discrimination, the court held that the rule of the common law was correctly stated by Pierce in his work on railroads, in a quotation which appears in the previous section of this note. In *H. & T. C. R. Co. v. Smith*, 63 Tex. 322, which was a suit for discrimination in the order of shipment, the court says: "These railroad companies derive their chartered rights from the state, and they owe an equal duty to each citizen. Having secured from the state extraordinary rights and privileges, they ought not to be permitted to exercise them in such manner as to benefit one individual, town or community to the detriment of another. In the exercise of the duties which relate to the public, these companies must, upon general principles, deal alike with all customers." See also *New York etc. R. Co. v. Gallagher*, 79 Tex. 685; 15 S. W. Rep. 694.

Vermont. In *Fitzgerald v. Grand Trunk R. Co.*, 4 Am. R. R. & Corp. Rep. 361, the suit was to recover a rebate of \$6 per car on lumber shipped over defendants road by the plaintiff. We refer to the report for a more complete understanding of the facts. The contract sued on was held void at common law, and the court says: "At common law, common carriers were held to be persons who exercised their calling for the public good, upon equal terms, and with the same facilities, to all their customers. They could not lawfully exercise their calling by granting advantages to one customer which they denied to another, but were held to the duty of serving all alike. Their

calling is one public in its nature, and the common law exacted of them a strict impartiality in their dealings with the public." It is said that the common law doctrine is stated "with great clearness and force" by BRASLEY, C. J., in *Messenger v. Railroad Co.*, 36 N. J. L. 407, from whose opinion we have already quoted.

Federal Courts. In *Atchinson, etc., R. Co. v. D. & N. O. R. Co.*, 110 U. S. 667 it is held that the provisions of the constitution of Colorado, which we have already quoted under the head of "Colorado," against undue or unreasonable discrimination by railroads, imposed no obligation not already imposed by the common law. See also *Express cases*, 117 U. S. 1; *Winona & St. Peter R. Co. v. Blake*, 94 U. S. 180; *Sinking Fund cases*, 99 U. S. 700, 719.

In *Hays v. Pennsylvania R. Co.*, 12 Fed. Rep. 309, a discrimination in favor of those sending more than 5000 tons of coal a year was held to be unreasonable. The court held that a railroad is a public agency. "Hence," says the court, "everybody constituting a part of the public, for whose benefit it was authorized, is entitled to an equal and impartial participation in the use of the facilities it is capable of affording." *Kinsley v. Buffalo, etc., R. Co.*, 37 Fed. Rep. 181, is a similar case, and supports the same views.

See also *Dinsmore v. Louisville, etc., R. Co.*, 2 Fed. Rep. 465; *Texas Express Co. v. Tex. & Pac. R. Co.*, 6 Fed. Rep. 426; *Southern Express Co. v. Memphis R. R. Co.*, 8 Fed. Rep. 799; *Southern Express Co. v. St. Louis, etc., R. Co.*, 10 Fed. Rep. 210; *Ex parte Koehler*, 23 Fed. Rep. 529; 25 Fed. Rep. 78; *Menacho v. Ward*, 27 Fed. Rep. 529; *Winson Coal Co. v. Chicago & A. R. Co.*, 52 Fed. Rep. 716; *Swift v. Philadelphia, etc., R. Co.*, 58 Fed. Rep. 858.

England. The cases usually cited as showing the common law of England on the subject of discrimination are recent cases, decided under statutes, which enjoined equality in charge, for the same or like service under the same or like circumstances. In speaking of the history of these clauses, Blackburn, J., in *Great Western R'y Co. v. Sutton, L. R.*, 4 Eng. & I. App., 226, says that at first such a clause as to equality was put into each railway act as to the committees seemed best, that soon these clauses came to be usual clauses which the chairman of the house of lords' committee required to be put into every such act and which were known from his name as "Lord Shaftesbury's Clauses," and that finally the principle was embodied in the Railway Clauses Consolidation Act of 1845, 8 & 9 Vict. C. 20, Sec. 90. This section required that railway tolls should be "at all times charged equally to all persons, and after the same rate, whether per ton, per mile or otherwise, in respect of all goods of the same description and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway, under the same circumstances."

In the case already cited, *Great Western R. Co. v. Sutton, L. R.*, 4 Eng. & I. App., 226, decided in 1868, p. 237, Blackburn, J., says: "At common law a person holding himself out as a common carrier of goods was not under any obligation to treat all customers alike. The obligation which the common law imposed upon him was to accept and carry all goods delivered to him for carriage according to his profession (unless he had some reasonable excuse for not doing so) on being paid a reasonable compensation for so doing; and if the

carrier refused to accept such goods, an action lay against him for so refusing; and if the customer, in order to induce the carrier to perform his duty, paid, under protest, a larger sum than was reasonable, he might recover back the surplus beyond what the carrier was entitled to receive in an action for money had and received as being money extorted from him. But the fact that the carrier charged others less, though it was evidence to show that the charge was unreasonable, was no more than evidence tending that way. There was nothing in the common law to hinder a carrier from carrying for favored individuals at an unreasonably low rate, or even gratis. All that the law required was, that he should not charge any more than was reasonable." Citing Byles, J., in *Baxendale v. Eastern Counties R'y Co.*, 4 C. B. N. S., 78 (93 E. C. L.), and Willes, J., in *Branley v. South Eastern R'y Co.*, 12 C. B. N. S., 74; 104 E. C. L., 74. In the former of these cases Byles, J. says, by way of interjection in the course of argument: "I know no common law reason why a carrier may not charge less than what is reasonable to one person, or even carry for him free of all charge." In the other of these cases Willes, J., expresses the opinion that at common law the carrier is under obligation to "to charge reasonably but not to charge equally." To these may be added the remark of Crompton, J., made in the course of argument in *Garton v. B. & E. R. Co.*, 1 B. & S., 112, 154, and often quoted that "the charging another party too little is not charging you too much." In none of these cases is any authority whatever cited, except as above noted in the case of *Blackburn, J.* Moreover the remarks quoted are *dicta* only. In none of the cases was the court adjudicating upon the common law. All the cases involved a construction of the English statutes, except that of *Branley v. South Eastern R. Co.*, 12 C. B. N. S., 63, 104 E. C. L. R., 63, in which it was decided that a contract for carriage made in France and valid by the law of France would be held valid in England.

In speaking of the English cases and the course of legislation and decision in reference to carriers in England, the court in *McDuffe v. Railroad Co.*, 52 N. H. 430, says: "In charters of common carriers, what is called the equality clause was inserted, requiring the carriers to furnish transportation on equal terms. The fashion of legislation once set, was studiously followed with a degree of reverence for precedent that does not prevail in this country. General statutes were passed, enacting the common law doctrine of reasonable equality, and new methods of enforcing it were introduced. And the practice of the English courts, on charters and general acts of this kind, has been so long continued, that the fact seems now to be overlooked that the general principle of equality is the principle of the common law. With so much legislation on the subject as there has been in that country, and so much litigation upon acts of parliament, it was not strange that the bar and bench should finally lose sight of the common law origin of the principle so many times enacted in different forms, and carried out in different methods prescribed by parliament. It seems to have been a result of the anxiety of parliament, that, instead of merely providing such new remedies and modes of judicial procedure as they deemed necessary for the enforcement of the common law, they repeatedly re-enacted the common law, until it came to be supposed that, in such an important matter as the public service of transportation by common

carriers, the public were indebted, for the doctrine of equal right, to the modern vigilance of parliament, instead of the system of legal reason which had been the birthright of Englishmen for many ages." P 454.

4. Resume of the authorities. From the foregoing exposition of the authorities it is manifest that the great preponderance is in favor of the proposition that the common law imposes upon carriers the obligation of impartiality and equality; that they must give the same rates, facilities, and accommodations to all under substantially the same circumstances and conditions, and that unjust discrimination in any particular is forbidden. The text writers are substantially unanimous, Mr. Bennett, editor of *Story on Bailments*, being the only one who squarely indorses the doctrine that, as respects charges, the carrier is bound simply to charge no more than a reasonable sum to each particular customer in each particular case of service, and that one who has been charged no more than a reasonable sum cannot complain that others were charged less or nothing for a precisely similar service. *Story on Bailments*, 6th Ed., § 508a. His views are based entirely upon *Fitchburg R. Co. v. Gage*, 12 Gray, 898, and the English cases cited.

The only decisions which support the same view of the common law as that entertained by Mr. Bennett are those of Colorado, Florida, Louisiana, Massachusetts, South Carolina, and England. The English decisions contain *dicta* only. Those in Louisiana and South Carolina disclose a difference in circumstances and conditions which affords at least some foundation, if not a sufficient foundation, for a difference in rates. In the California and Florida cases the plaintiff sought to recover the difference between what he had paid and what others had been charged for the same service. So in *Spofford v. Boston & Me. R. Co.*, 128 Mass. 826. In *Fitchburg R. Co. v. Gage*, 12 Gray, 898, the defendant sought to set off such difference against a claim for freight. What was really decided in those cases was that the shipper could not recover back any part of the charges he had paid, unless they were unreasonable, and then only the excess over what was a reasonable sum, and that the fact that someone else was charged less did not necessarily make the charge against him unreasonable. No fault can be found with the principles thus adjudicated. The contrary doctrine would lead to the absurdity pointed out by Cockburn, C. J., in *Garton v. B. & E. Ry. Co.*, 1 B. & S. 112, 154, that if a railroad company should choose to carry someone for nothing every other person for whom a like service had been performed could recover back all he had paid. In *Fitchburg R. Co. v. Gage*, 12 Gray, 898, it is said that the shippers did not claim that the price charged them was "in any degree excessive or unreasonable." So in effect are the cases of *Cowden v. Pacific Coast S. S. Co.*, 94 Cal. 470; 29 Pac. Rep. 878, and *Johnson v. Pensacola & P. R. Co.*, 16 Fla. 623, in which the declaration, to which demurrers were sustained, contained no averment that the charges complained of were unreasonable. In all these cases the plaintiffs complained simply that they had been charged more than someone else had been charged and sought to recover the difference. In holding that they could not recover this difference, unless the charges were unreasonable to this extent, the court did not decide that there was no remedy where one shipper was charged only a reasonable sum and another less than

a reasonable sum to the injury of the former. In all these cases the court is careful to suggest that there may have been peculiar circumstances and conditions which justified the difference in charges, and it is implied, or suggested at least, that if there were no such peculiar circumstances and conditions, the difference in rates was unjust. In short, in none of these cases is it decided that the common law permits a carrier to discriminate in charges between individuals as he pleases, so long as he charges none more than a reasonable price, nor that a person has no remedy who is injured by such discriminating charges, so long as he is not charged an unreasonable sum himself.

5. The common law before the introduction of railroads, as bearing on the subject of discrimination by carriers. The cases upon discrimination by carriers are all of comparatively recent date. So far as we have been able to discover, after a quite extended examination, the earliest case in this country is that of *Sandford v. Railroad Co.*, 24 Penn. St. 378, decided in 1855. That was followed four years later (1859) by *Fitchburg R. Co. v. Gage*, 12 Gray, 393. All the others have been decided since 1870, and most of them since 1880. The English cases referred to were decided between 1858 and 1868.

Speaking in 1868 Mr. Justice BLACKBURN says: "There was nothing in the common law to hinder a carrier from carrying for favored individuals at an unreasonably low rate, or even gratis. All that the law required was that he should not charge any more than was reasonable." *Great Western R. Co. v. Sutton*, L. R. 4 Eng. & I. App. 226, 237. This may be taken as a fair and representative expression of what is understood to be the common law by one class of authorities. It will be interesting to inquire what foundation there is in reason or authority for these propositions.

Prior to the era of railroads, only two points had been settled in reference to the duties of common carriers, bearing upon the question of discrimination. In *Bastard v. Bastard*, 2 Shower, 82, (1690), the suit was against the defendant as a common carrier for the loss of a box. There was a motion in arrest because no sum was mentioned as the hire to be paid. The court held that it was not necessary, that if there was no agreement as to the amount, the carrier could recover on a *quantum meruit* that is, that he could recover a *reasonable compensation*. To the same effect are the early cases of *Lovett v. Hobbs*, 2 Shower, 127, 129; *Rogers v. Head*, Cro. Jac. 263; *Nichols v. Moor*, 1 Sid. 86. Following these cases it has become a well settled and undisputed principle of the common law that *a common carrier is entitled to reasonable compensation for his services and no more*. *Harris v. Packwood*, 3 Taunton, 264, 272; *Citizen's Bank v. Nantucket S. S. Co.*, 2 Story, 10, 35; *Sayre v. Louisville Union Brewing Assn.*, 1 Duvall, Ky., 143, 146; *Pickford v. Grand Junction R. Co.*, 8 M. & W. 378; *Louisville, etc., R. Co. v. Wilson*, 119 Ind. 352; *Killmer v. New York, etc., R. Co.*, 100 N. Y. 395; *Winona & St. P. R. Co. v. Blake*, 94 U. S. 180; *Angell Carr.* §§ 124, 356, 392; *Hutch. Carr.* §§ 447, 447a; *Wood's Brown on Carr.* §§ 82, 83.

In *Jackson v. Rogers*, 2 Shower, 827, (1684), the suit was against the defendant as a common carrier for refusing to carry for the plaintiff, although the plaintiff tendered the hire and the defendant had conveniences to carry the parcel offered. It was held that the defendant was liable. Since then it has

been an unquestioned doctrine of the common law that common carriers "are bound to do what is required of them in the course of their employment, if they have the requisite convenience to carry, and are offered a reasonable or customary price; and if they refuse without some just ground they are liable to an action." 2 Kent Com. 599, citing Jackson v. Rogers, 2 Show, 382; Elsee v. Gatwerd, 5 T. R. 143; Batson v. Donovan, 4 B. & Ad. 32; Pickford v. Grand Junction R. Co., 8 M. & W., 373; 1 Bell's Com. 467; Dwight v. Brewster, 1 Pick. 50; Jencks v. Coleman, 2 Sumner 231; Story Bail. § 496; Pomeroy v. Donaldson, 5 Miss. 36; Patton v. McGrath, Dudley (S. C.) L. & Eq. 159; Hale v. New Jersey Steam Co., 15 Conn. 589. To the same effect are Wheeler v. Railroad Co., 31 Cal. 46, 55; Great Western R. Co. v. Burns, 60 Ill. 284; Sandford v. Railroad Co., 24 Penn. St. 378; H. & T. C. R. Co. v. Smith, 68 Tex. 333; Atwater v. Del., L. & W. R. Co., 44 N. J. L. 55; 2 Am. & Eng. Encyclo. Law, p. 793.

This is the extent to which the development of the common law had gone on the subject of discrimination prior to the American revolution, or prior to the introduction of railroads. It had not been decided in any case that a carrier could charge different prices to different customers for the same service, provided it charged none more than a reasonable compensation. It had not been decided, in the language of BLACKBURN, J., that "all that the law required was that he should not charge any more than was reasonable." It had been decided that the carrier could not charge any person more than was reasonable, but it does not follow that that was *all* that the law required. The obligation to charge *reasonably* is not inconsistent with the obligation to charge *equally*. To hold that it was the duty of the carrier to make his charges both reasonable *and* equal, was not in conflict with anything which had ever been decided by the common law courts. So far as the question of discrimination had come up at all, the decisions had been against the right to discriminate. The carrier could not choose whom he would serve; he could not serve one and refuse another, but must serve all indifferently in the order of application.

6. Conclusions. Common law principles applied to the new conditions created by the American Revolution and the railroad era. Unjust discrimination by railroads forbidden by the common law. We have considered in the last section the state of the common law as it existed up to the time when railroads first began to be built and operated. In considering what answer the common law returns to the various questions which have arisen in recent years, touching various forms of discrimination by railroads, it is necessary to take note of the new conditions which have followed or accompanied the introduction of railroads. In the first place, the capital of individuals was inadequate for the construction of such roads, and for this, as well as for other reasons, railroads have been almost universally built, owned and controlled by corporations, deriving their existence, in this country at least, from the will of the people. In the next place, railroads could not be built without the right to take private property against the will of the owner, and this, according to our fundamental law, could not be done without the consent of the people, as represented in the legislature, nor then, except for a public use. Hence, it came about that railroads were

granted the extraordinary power of eminent domain on the theory that they were a sort of public highway, constructed for the public use and benefit. *Bloodgood v. Mohawk & Hudson R. Co.*, 14 Wend. 15; 18 Wend. 91; *Lewis' Em. Dom.* § 170, and cases cited. In the third place, the construction of railroads soon resulted in their securing a monopoly of the carrying trade by land. The old methods of transportation were driven out, and the railroads remained sole possessors of the field. Lastly, it must not be lost sight of that these new conditions had arisen in a nation which, to use the words of Lincoln, was "conceived in liberty and dedicated to the proposition that all men are created equal." (Gettysburg address.)

The question then is, whether in this land of liberty and equality, a railroad corporation, deriving its right to exist from the people, and clothed by them with large and extraordinary powers and privileges, on the plea that it is engaged in a sort of public service, can discriminate between different members of the public in the price or quality of the service rendered, or in the facilities or accommodations offered by it? What is the answer of the common law to this question?

There is no doubt that railroad companies are common carriers, and that the rules and principles of the common law pertaining to carriers are applicable to them. *Hutch. Carr.* § 67. Chancellor KENT says: "The best evidence of the common law is to be found in the decisions of the courts of justice, contained in numerous volumes of reports, and in the treatises and digests of learned men, which have been multiplying from the earliest periods of the English history down to the present time. The reports of judicial decisions contain the most certain evidence, and the most authoritative and precise application of the rules of the common law. Adjudged cases become precedents for future cases resting upon analogous facts and brought within the same reason." 2 Kent Com. p 473.

We have already, in the last section, referred at length to this evidence of the common law pertaining to discrimination by carriers. These decisions do not give a complete and categorical answer to the question above propounded. They say that the carrier shall charge only a reasonable compensation for his service. But whether he may charge one person more, and another less for the same service, the greater charge being no more than a reasonable compensation, was not decided in any case before the age of railroads. The common law decisions further say that the carrier may not arbitrarily serve one and refuse to serve another, while having the convenience to do so. But whether he may afford facilities or accommodations to one which he refuses to another, or in any way give preferences or advantages to one which are denied to another, except as above, had not been decided.

KENT says that "adjudged cases become precedents for future cases resting upon analogous facts, and brought within the same reason." Is not the refusal to carry for A. at the same price that is charged to B. analogous to the case of refusing to carry for A. at all while carrying for B. and others? And so if A. is charged the same price for third class accommodations that B. is charged for accommodations of the first-class. In short, are not all cases of discrimination analogous to the discrimination made when one person is served and another refused? As said by the court in *McDuffee v. Railroad*

Co., 53 N. H. 430, 450, "A denial of the entire right of service by a refusal to carry, differs, if at all, in degree only, and the amount of damage done, and not in the essential legal character of the act from the denial of the right in part by an unreasonable discrimination in terms, facilities or accommodations." And if this is so, then are not all cases of discrimination also "within the same reason?" What is the reason underlying the decision, that if the carrier refuses to accept A's parcel, while having convenience to do so, and while accepting like parcels for B. and others, A. shall have his action for such refusal? Is it not that the common carrier is engaged "in a public employment, takes upon himself a public duty and exercises a sort of public office," (McDuffee v. Railroad Co., 52 N. H. 430, 447) and, therefore, that he owes an equal duty to every member of the public, and must treat all alike and impartially? If this be so, then all sorts of unjust discrimination are within the reason of the common law decisions referred to, and are concluded by such decisions, unless it can be shown, in the language of KENT, "that the law was misunderstood or misapplied" in those decisions. 2 Kent Com. 475 But as they have been acquiesced in and repeatedly reaffirmed for two hundred years, they must be accepted as correct.

Again, what is the reason of the common law rule that the carrier can charge only a reasonable compensation for his services? Is it not that the business is affected with a public interest, and must, therefore, be subject to the requirements of reason and justice? And if the carrier is subject to the requirements of reason and justice in the *amount* of his charge, why not also in other particulars affecting the service? And if the carrier is subject to the requirements of reason and justice in the conduct of his business and his dealings with the public, then, clearly, he is precluded from making any unjust or unreasonable discrimination. See McDuffee v. Railroad Co., 52 N. H. 430, 450, 452

If, however, discriminations in charges, facilities and accommodations are held not analogous to a discrimination between persons whereby some are served and others refused, or not within the reason of the cases which hold the latter discrimination unlawful, nor within the reason of the rule which prohibits an unreasonable charge, the question remains whether the former discriminations are unlawful by virtue of the general principles of the common law. We are to consider these forms of discrimination as new cases to which the principles of the common law have never been judicially applied and determine what result the application of those principles requires. The mode of procedure in such cases is aptly stated by Chief Justice SHAW, in *Norway Plains Company v. Boston & Maine R. Co.*, 1 Gray, 263. which involved a question as to the termination of the liability of a railroad company for freight. He says: "It is one of the great merits and advantages of the

principles of equity and policy are rendered precise, specific, and adapted to practical use by usage which is the proof of their general fitness and common convenience, but still more by judicial exposition; so that, when in course of judicial proceeding, by tribunals of the highest authority, the general rule has been modified, limited and applied, according to particular cases, such judicial exposition, when well settled and acquiesced in, becomes itself a precedent, and forms a rule of law for future cases under like circumstances. The effect of this expansive and comprehensive character of the common law is that whilst it has its foundations in the principles of equity, natural justice, and that general convenience which is public policy; although these general considerations would be too vague and uncertain for practical purposes in the various and complicated cases of daily occurrence in the business of our active community; yet the rules of the common law, so far as cases have arisen and practices actually grown up, are rendered in a good degree, precise and certain, for practical purposes, by usage and precedent. Another consequence of this expansive character of the common law is, that when new practices spring up, new combinations of facts arise, and cases are presented for which there is no precedent in judicial decision, they must be governed by the general principle applicable to cases most nearly analogous, but modified and adapted to new circumstances, by considerations of fitness and propriety, of reason and justice, which grow out of these circumstances. The consequence of this state of the law is, *that when a new practice or new course of business arises, the rights and duties of parties are not without a law to govern them; the general considerations of reason, justice, and policy, which underlie the particular rules of the common law, will still apply, modified and adapted, by the same considerations to the new circumstances.* If these are such as give rise to controversy and litigation, they soon, like previous cases, come to be settled by judicial exposition, and the principles thus settled soon come to have the effect of precise and practical rules. Therefore, although steamboats and railroads are but of yesterday, yet the principles which govern the rights and duties of carriers of passengers, and also those which regulate the rights and duties of carriers of goods, and of the owners of goods carried, have a deep and established foundation in the common law, subject only to such modifications as new circumstances may render necessary and mutually beneficial."

Accordingly to these views any new question arising as to the rights and duties of railroads as common carriers, and not falling within any of the established rules of the common law, is to be resolved by the application of the general considerations of reason, justice and policy upon which the common law is founded. And this accords with what Chancellor Kent says, that "the rules and maxims which constitute the immense code of the common law" have been evolved by "the application of the dictates of natural justice and of cultivated reason to particular cases." 2 Kent Com. 472. What is the result, then, of the application of "the general considerations of reason, justice and policy," or of "the dictates of natural justice and of cultivated reason," to the various forms of discrimination by railroad companies? To ask this question seems but to answer it. Railroad companies derive their existence from the people. They have received from the people important franchises

and privileges, because they are a public agency and a public use. They hold their right of way and its appurtenances upon a sort of public trust. They owe a duty to the public generally and every member of the public has a right to demand their service, and this right is necessarily an equal and common right in each one. The duty of the companies is correlative and they are bound to put all members of the public upon an equality. To give one a preference or advantage over another under substantially the same circumstances and conditions is *unjust* because it violates the principle of equality proclaimed at the foundation of our government, and the equal right of every one to a public service, and *unreasonable*, because not founded upon any substantial difference in circumstances and conditions. Discriminations in the better sense of the word, that is discriminations based upon real and adequate differences in the circumstances and conditions of the service, are both just and reasonable and have never been condemned by either courts or legislatures. It is only *unjust* or *unreasonable* discrimination that is injurious and such discrimination is plainly and necessarily contrary to the dictates of both justice and reason and so forbidden by the general principles of the common law.

These conclusions are in accordance with numerous decisions relating to corporations organized to serve a public purpose, such as telegraph and telephone companies, water and light companies and the like, which are held to the duty of treating the public alike and with impartiality. See *Portland Natural Gas & Oil Co. v. State*, and note, ante, p. 640.

7. What constitutes unjust discrimination. We had intended to treat this subject at length in a note to *Hoover v. Pennsylvania R. Co.* (Penn.), 27 Atl. Rep. 282, but have not been able to do so in time for insertion in this volume, and therefore have postponed both the case and the note to the next volume.

PRICE v. HOLCOMB, ET AL.

(Supreme Court of Iowa. Oct. 9, 1893.)

1. CORPORATIONS. RIGHT TO VOTE STOCK HELD UNDER CONTRACT WITH CORPORATION NOT FULLY PERFORMED. Stock in a corporation was issued to B., with the consent of all the stockholders, on his promise to pay a certain sum in making repairs on the plant of the company, and as working capital. He paid only part of the sum, as he had agreed. *Held* that such a proportion of the stock was paid for as the sum expended bore to the entire sum agreed to be paid and that this amount of stock could be lawfully voted by B., and this amount being sufficient to constitute a majority of the stock, a resolution in favor of which he voted all his shares, including those not paid for, was legally adopted.

2. RIGHT OF MAJORITY OF STOCKHOLDERS TO SELL ALL THE PROPERTY OF THE CORPORATION AND WIND UP ITS BUSINESS. Where a corporation has operated its works from the beginning and for several years at a loss, and the works have been idle for a year, and the company, though solvent, is without the necessary working capital, and unable to obtain it, and no tangible plan of operation has been suggested, though the subject has been fre-

quently discussed, a majority of the stockholders are justified in ordering a sale of the company's property so as to close up its business, and they have power to make such sale even against the protest of the minority.

3. EFFECT OF SUCH SALE UPON THE CORPORATE EXISTENCE. STATUTE PROHIBITING DISSOLUTION EXCEPT BY UNANIMOUS CONSENT CONSTRUED. A sale of all the property of a corporation by a resolution of a majority of the stockholders, though it may terminate its business, does not dissolve the corporation, and, when necessary for the interests of the stockholders, is not prohibited by Code, § 1066, which provides that no corporation can be dissolved prior to the period fixed in the articles of incorporation except by unanimous consent, unless a different rule has been adopted in the articles.

4 Code, § 1066, providing that no corporation can be dissolved prior to the period fixed in the articles of incorporation except by unanimous consent, unless a different rule has been adopted in the articles, applies only when no circumstances arise that defeat the purpose for which the corporation was organized, and that require an earlier dissolution, as where the business proves a failure.

5. RIGHT OF MAJORITY STOCKHOLDER TO PURCHASE THE CORPORATE PROPERTY AT A PUBLIC SALE ORDERED BY HIS VOTE. The relation of a person owning a majority of the stock of a corporation to the other stockholders is not that of agent or trustee, but joint owner, and he may, acting in good faith, purchase the property of the company at a public sale for which he voted the stock.

PLAINTIFF, owner of one-seventh of the stock of the Iowa Rolling Mill Company, a corporation under the laws of Iowa, organized for the purpose of rolling and making iron at its works in Burlington, Iowa, prosecutes this action in equity to set aside a sale and conveyance of the works of said corporation to the defendant J. F. Holcomb in pursuance of certain resolutions adopted by the stockholders. Decree was entered dismissing plaintiff's petition, from which decree he appeals.

C. L. Poor and Thomas Hedge, for appellant. *Power & Huston*, for appellees.

GIVEN, J.—1. Prior to 1887 the plaintiff and others, residents of Burlington, Iowa, organized a corporation known as the Burlington Rolling Mill Company, with a paid up capital of \$36,000, for the purpose of erecting and operating a rolling mill at Burlington for the manufacture of iron. The works were constructed and operated for a time at a loss. These parties being inexperienced in the business, and the company without sufficient capital, the defendant Richard Brown, of Youngstown, Ohio, a gentleman of experience in the iron business and possessed of means, was solicit-

ated to take an interest in the business, and to associate with him other men of experience to operate the works. In pursuance of an agreement, the defendant the Iowa Rolling Mill Company was incorporated with a capital stock of \$70,000, and the property of the old company was transferred to it free of debt and incumbrance. Certificates for one-half of the capital stock were issued to the stockholders in the old company in lieu of their stock therein, and for the other half to Mr. Brown and his associates, M. C. Williams and E. H. Wilson, of Youngstown, upon Brown's promise to pay 20,000, to be used in making needed changes in the works and as working capital. The defendant company, being thus organized, leased the works to Brown and his associates for one year free of rent, and at the end of that year extended the lease for a second. Brown and his associates operated the mill on their own account, but in the name of the corporation and through its treasurer, until in May, 1889, when the buildings were destroyed by fire. The mill was operated at a loss to Brown and his associates. During the second year of the lease the defendant J. F. Holcomb, of Youngstown, purchased nearly all of the stock held by Wilson, and thereafter took part in the management of the business. Certain improvements were authorized to be made on the works during the lease, all of which were made and paid for by Brown and his associates, at a cost, as they claim, of \$17,000. A committee of the company reported in favor of allowing \$16,746.96 of this claim. The works were rebuilt after the expiration of this lease, but were not operated, because of a failure to agree upon any plan for operating them. While all parties seem to have desired that the works should be operated, no tangible plan was suggested. There was a proposition from one Roberts to pay a royalty on the iron made for the use of the works, but this offer was indefinite, and gave but little assurance of work being resumed under it. The fact is apparent that such differences had sprung up between the Burlington and Youngstown stockholders that it was not likely that any plan would be agreed upon for leasing or operating the works. The record of proceedings of stockholders,

following resolution, which was seconded and adopted, viz: 'Whereas the corporation has been organized and in existence for about three years, having its mills ready for operation; and whereas the entire capital stock of this company, seventy thousand (\$70,000) is invested in the grounds and plant, leaving the company without any working capital; and whereas, the mills were operated for the first two years by Richard Brown and others under a contract, during which time no money was made by such operation either for Mr. Brown and others or for the company; and whereas, the mills have stood idle ever since October, 1889, this company being utterly unable to set them in motion for want of capital, and during which time the directors have not been able to make any contract or arrangements for the operation of the mills, and in the mean time the property and plant have been largely decreasing in value, and will continue so to do if allowed to remain idle, and, as a result, the stockholders are not only losing the use of their capital invested, but are losing the capital itself; and whereas, the officers and directors do not report any plan or prospect for any arrangement for the operation of the mills during the coming fiscal year, and the company cannot operate them for want of means: Therefore, resolved, that the board of directors of this company be, and they are hereby, directed and instructed to proceed at once and sell the entire property and plant of this company, either at public or private sale, and, on such terms as they deem for the best interests of the stockholders, and that they make the sale within the next sixty days; and, they are hereby authorized to make, execute and deliver any and all necessary and proper deeds, contracts, and other instruments in order to effectually carry out and consummate such sale, and further, that they report their doings in this matter to an adjourned stockholders' meeting. Resolved further, that when this meeting is adjourned it adjourn to meet on the 8th day of November, 1890, at 3 o'clock p. m., to transact such business as may then seem proper, and, further, that the directors make report at that meeting of the prospects of sale or other disposition of the property, and that no actual sale be made previous to that date unless pursuant to some other action of the stockholders."

"October 7, 1890. Board of directors' meeting. 'Whereas, the stockholders of this meeting, at their annual meeting, October 7,

1890, by a resolution there offered and adopted, directed and instructed the directors of this company to proceed at once and sell the entire property and plant of this company, either at public, or private sale; and whereas, the sale, by the resolution, must be consummated within sixty days from Oct. 7, 1890; and whereas, on account of approaching winter, it is desirable to make such sale as early as possible, to enable the purchaser or purchasers to make necessary improvements and repairs: Therefore, resolved, that the president and secretary of this board be, and they are hereby, directed and instructed to proceed at once, and solicit offers and enter into negotiations for the sale of the entire property and plant of this company, by advertising the same at their discretion in at least two of the leading iron trade papers of this country, and otherwise, as they may deem advisable, and that they make a full report in relation thereto to this board at some appropriate time, prior to the adjourned annual stockholders' meeting to be held November 8, 1890.' To which J. W. Price offered the following substitute, which was also seconded, viz.: 'Resolved that the board of directors, proceed at once to make the necessary arrangements for putting the Iowa Rolling Mills into operation, under the management of its own officers at the earliest practicable time,' substitute lost, and the original motion carried."

The minutes of an adjourned meeting of the stockholders of the Iowa Rolling Mill Company held on November 8, 1890: "J. F. Holcomb offered a resolution that the board of directors are hereby instructed to proceed at once and sell at public sale the mill, premises, and entire property and plant of this corporation; terms of sale half cash, and the balance in six and twelve months from date of sale, with six per cent. interest per annum with good security. Mr. Guelich offered an amendment providing that no bids should be entertained at said sale for less than seventy-five cents on the dollar of the stock. Mr. Huston moved to amend the amendment by striking out 'seventy-five cents on the dollar' and inserting '\$25,000.' Mr. Huston's amendment was carried; Price, Guelich, and Gear voting 'No,' and the resolution, as amended, was carried by the following vote: Ayes: Richard Brown, by Holcomb, 170 shares; E. M. Wilson, by Holcomb, 10 shares; J. F. Holcomb, 177½ shares; J. G. Foote, 14 shares; C. J. Ives, by Foote, 17 shares; E. S. Huston, 5 shares,—total, 398½. Noes:


J. W. Price, 100½ shares; Price & Wiese, by Price, 8 shares; Theodore Guelich, 69½ shares; J. H. Gear, 78½ shares; Mrs. H. F. Gear, by Guelich, 28 shares; Horace Rand, by Guelich, 5 shares,—total, 282 shares. Mr. Price objected to any stock being voted that had not been fully paid for, and ruled that no such stock be voted, but his ruling was not sustained. 'The undersigned stockholders protest against the resolution offered by J. F. Holcomb, and adopted, to sell the property of this company at public sale on December 13, 1890, the limit to the price being entirely too low, in our estimation. [Signed] Theo. Guelich. H. F. Gear, by Guelich. H. S. Rand, by Guelich. John H. Gear. J. W. Price.' Adjourned to meet December 12, 1890. J. F. Holcomb, Secretary."

"Dec. 12, 1890. Adjourned stockholders' meeting. After some general discussion as to the condition of the property and the prospects of selling, Mr. Holcomb offered the following resolution: 'There being no offers for the property and plant of this company at private sale, and no offers to lease the same which are acceptable to the majority interest, therefore, be it resolved, that the board of directors be, and they are hereby, instructed and directed to proceed and sell the same at public sale on the 13th instant, as advertised, and to this end the president and secretary are hereby instructed and directed to attend the sale, procure the services of a suitable person as auctioneer, and are charged with the duty and responsibility of seeing that the orders of this company in the matter are carried out. Resolved, further, that when this meeting adjourns it adjourn to meet on Saturday, December 20, 1890, at three o'clock P. M., to receive the report of the sale, and to transact any other business which may then come before the meeting.' Which resolution was adopted by a vote of 376½ shares for, and 282 against."

"Dec. 20, 1890. Adjourned stockholders' meeting. J. F. Holcomb then offered the following resolution: 'There having been no bids for the property and plant of this company at the public sale of the same, advertised to take place at the court house door this day, at two o'clock P. M., and said sale having been adjourned to take place on Saturday, the 27th instant, at the same hour and place, said action is hereby approved, and the president and secretary are hereby authorized and directed to attend and conduct said sale, advertising the same in the local papers. It is

further ordered that when this meeting adjourns, it be to meet on Saturday, the 27th instant, at three o'clock P. M., at which time the president and secretary are hereby ordered to make report of said sale.' Which resolution was adopted by a vote of 376½ for, and 172½ against."

At the meeting, to wit, December 27, 1890, the stockholders, by a vote of 376½ shares for, and 172½ shares against, adopted the following: "Mr. Huston also submitted the following order: 'The property and plant of this company, having been this day sold at public sale to John F. Holcomb for twenty thousand dollars, pursuant to orders and directions of this company, and there being no prospect of making a more favorable sale, and, owing to apparently irreconcilable differences between the stockholders, there being no prospect of putting the mills in operation under any plan which would offer any substantial return to the stockholders, it is therefore ordered that said sale be, and the same is hereby, approved and confirmed, and the president and secretary are hereby authorized and directed to execute the proper deed and other papers, and complete said sale, according to the terms authorized: Provided, however, that, such sale having been made to a stockholder of this company, it shall not be completed for eight (8) days from this date, and if, during that time, any bona fide bid of not less than five hundred dollars in excess of the above bid be received by the president and secretary, then said property shall again be offered at public sale at an adjourned meeting of this stockholders' meeting, to be held at the office of Guelich & Blank on Monday, January 5th, 1891, at 3 o'clock P. M., and the property then be sold to the highest bidder, according to the terms heretofore advertised, and said sale at once perfected and completed; but, if no bid of an increase of five hundred dollars is so received, then the sale to John F. Holcomb for twenty thousand dollars shall at once be completed and perfected, and the necessary papers executed and delivered.' 'On behalf of himself, as the holder of 69½ shares of the stock, J. H. Gear, Mrs. H. F. Gear, and H. F. Rand holding 70½, 28, and 5 shares of stock, respectively, for whom he has a proxy, the undersigned hereby protests against the pretended sale of the property and plant of the company, and against the consummation thereof, for the reasons (1) that the stockholders, under our articles of incorporation, have no author-



ity to act in the premises ; (2) that the stock not paid for has no right to vote in a stockholders' meeting. Burlington, Iowa, Dec. 27th, 1890. Theo. Guelich."

"Jan. 5th, 1891. Adjourned stockholders' meeting. Mr. Huston offered the following order : ' There being no further or better offer for the property and plant of this company over and above \$20,000, as bid by John F. Holcomb at the public sale held December 27th, 1890, it is now ordered that the sale to him at the price, be and the same is hereby, approved and confirmed, and the president and secretary are hereby directed to execute the proper deed thereof, and deliver the same to said John F. Holcomb, on his making payment therefor according to the terms of sale, to wit, one-half cash, and the balance in six and twelve months from date of sale, at six per cent. interest with good security.' Which order was adopted by a vote of 376 $\frac{1}{2}$ shares for, and 172 $\frac{3}{4}$ against." And at the same meeting the following order was offered : " It appearing that a proper deed for the property and plant of this company to John F. Holcomb in accordance with the sale made to him, as appears on the records of this company, as been submitted to J. W. Price, president of this company, for his signature, and he having refused to execute it, it is now ordered that the secretary be, and his ereby, instructed and directed to take such steps as may be necessary, including employing counsel and instituting legal proceedings in the name and on behalf of this company, to compel the execution of such deed by the president, as ordered by this company,"—which order was adopted by the same vote.

It was upon the authority of these resolutions that the sale in question was made and confirmed to the defendant Holcomb. Plaintiff being president of the company, and refusing to execute a deed to Holcomb, proceedings were had whereby Mr. Brown, as vice president, was authorized to and did execute a deed to Holcomb, which was approved by the board of directors, March 31, 1891. This action having been commenced January 2, 1891. the board of directors, at its meeting March 30, 1891, ordered as follows : " It is further ordered that upon said purchaser filing with the treasurer the written consent of not less than three-fourths ($\frac{3}{4}$) in amount of the stock of this company, that the deed to him shall be delivered, without requiring payment in cash or notes as

provided by the terms of sale, and an obligation signed by himself and Richard Brown, of Youngstown, Ohio, that they will, when requested by this board, pay over to the treasurer the pro rata share of the proceeds arising from said sale, which shall then be coming to such stockholders as have not given their written consent as aforesaid, said deed shall be at once delivered to the purchaser, John F. Holcomb." The written consent of stockholders and the obligation of Holcomb and Brown were executed as required by this order, and through inadvertence were retained by Holcomb, as secretary, instead of being filed with the treasurer. Upon the execution of these instruments the deed in question was delivered, and Holcomb took possession of the works.

2. The articles of incorporation of the defendant company provide that the capital stock shall be all paid up, "and that every stockholder shall be entitled to one vote for every share of stock so held." It will be observed that the stock issued to Brown and his associates was voted in favor of their resolutions authorizing and confirming the sale and conveyance to Holcomb, and was necessary to constitute a majority. Appellant contends that Brown had not paid the \$20,000 in cash, as agreed, and therefore said stock was not paid for and not entitled to be voted. That stock was issued with the consent of all the stockholders, by the plaintiff as president, upon Brown's promise to pay the \$20,000 for the purpose expressed. If this was all that appeared it might well be questioned whether Brown's obligation to pay the \$20,000 was not a payment for the stock, within the meaning of the articles. We have seen, however, that Brown had paid at least \$16,746.96 of the \$20,000 for improvements authorized, as he had agreed to do. It is certainly clear that Brown was entitled to credit on the \$20,000 for the amount thus paid, and to that extent the stock was paid for. It is argued that nothing less than a full payment of the \$20,000 was a payment for any part of this stock. The stock was in shares of \$100 each, and, while this might be true as to a fraction of a share, it is certainly not as to the 850 shares. Mr. Brown was entitled to a share as fully paid up as soon as he had paid the agreed price thereof. The amount paid entitled him to at least 293 shares. The highest number of shares voted against either of the resolutions was 282, while all the Brown stock and 48½ shares of other stock, admitted to have been paid for, were

voted for the resolutions. Counting the Brown stock at 293, there was a clear majority of paid up shares in favor of each of said resolutions. During the time the works were operated under the lease, it was in the name of the corporation, with the knowledge and consent of all the stockholders. All money was received and paid through the treasurer, and the president made some of the operating contracts. Brown paid more than the price of his stock into the treasury for operating expenses, and thus became entitled to an accounting with the company as to the \$20,000 and the money so paid. The stock issued to Brown and his associates was continuously voted at all meetings with the knowledge of all the stockholders, without objection, until the protest mentioned above. We cannot say, with the light of all these facts, that the resolutions authorizing and confirming the sale were not adopted by a legal majority of the stock voted.

8. It is unquestionably true that a private corporation holds its property as a trust fund for the stockholders, and that, when a majority of the stockholders act together, they are in a sense the corporation, and must act with due regard to the right of the minority. If the majority decide arbitrarily, and without just cause to sell the property of the corporation to the prejudice of the minority, and thereby compel the winding up of the business of the corporation, it is a fraud upon the minority, and courts of equity will interfere. If, however, just cause exists for selling the property, as when the corporation is insolvent, and the sale is necessary to pay debts, or where, from any cause, the business is a failure and an unprofitable one, and the best interests of all require it, the majority have clearly power to order the sale, and in such case their acts are not *ultra vires*. Cook, Stockh. & Corp. Law, §§ 656, 662, 667. In this last section it is said: "If, however, the corporation is an unprofitable and failing enterprise, then a sale of all the corporate property with a view to dissolution may be made by the majority of stockholders." It would be a harsh rule that would permit one stockholder to hold the others to their investment when just cause existed for closing the business of the corporation. *Lauman v. Railroad Co.*, 30 Pa. St. 42. In *Sawyer v. Printing Co.*, 77 Iowa, 242; 42 N. W. Rep. 300, this court recognized the right of the majority of stockholders to make sale of all the corporate property when just cause existed for so doing.

and held, under the facts of the case, that the sale was warranted, and was not a fraud upon the minority. Appellant cites at length from *Ervin v. Navigation Co.*, 27 Fed. Rep. 625. In that case there was no claim of necessity for the disposition of the corporate property that was made. It is said: "Plainly, the defendants have assumed to exercise a power belonging to the majority in order to secure personal profit for themselves, without regard to the interests of the minority. They repudiate the suggestion of fraud, and plant themselves upon their right as a majority to control the corporate interest according to their discretion." It was plainly held that a court of equity would not tolerate a discretion that did not consult the interest of a minority. The right of a majority to wind up the affairs of a corporation like this, and dispose of its assets, even against the objection of a minority, when the business could no longer be advantageously carried on, is recognized. See *Hayden v. Directory Co.*, 42 Fed. Rep. 875, a case similar in many facts to this, and in which the rule just announced was recognized. We must look to the facts, and see if the action of the majority in ordering the sale in question was warranted by the circumstances. The enterprise was a new one in Iowa. The works had been operated at a loss from the beginning. They had been idle for about one year. The corporation, though solvent, was without the necessary working capital, and unable to secure it. No tangible plan for operating the works was suggested, though the subject was frequently discussed. True, after the adoption of the first resolution to sell, it was proposed to lease to Mr. Roberts, but, as already stated, his offer was indefinite, if it may be called an offer, and afforded no reasonable ground for expecting that the works could thereby be put in operation. We are inclined to think that this plan was presented by the minority for the purpose of preventing the sale ordered, rather than for any hope of starting the works under it. A marked disagreement had sprung up between the plaintiff and the defendant Holcomb, neither being willing for the corporation to assume business with the other in even partial control. The Burlington stockholders mainly took side with the plaintiff, and the Youngstown stockholders with Holcomb. It was apparent that no agreement could be reached by which the works could be operated or leased. No alternative

was apparent but to leave the works to rust and decay in idleness, or to sell them. We think the circumstances fully justified the action of the majority in authorizing the sale of the works. Appellant cites section 1066 of the Code, which provides as follows: "No corporation can be dissolved prior to the period fixed in the articles of incorporation except by unanimous consent, unless a different rule has been adopted in their articles." It is contended that as the articles fixed twenty years, a sale of all the property that necessarily terminated the business could not be made except by unanimous consent. The sale of all the property may have the effect of terminating the business for which the corporation was organized, but it does not dissolve it. Such a sale no more dissolves the corporation than would the giving of a mortgage that might ultimately result in all the property being taken from the corporation. *Buell v. Buckingham*, 16 Iowa, 296. This corporation still exists, and is properly made a party to this action as an existing corporation. It is certainly not the purpose of section 1066 to perpetuate the existence of corporations when circumstances arise demanding their dissolution. Hence, if the sale of the property was necessary, the right to make it would not be defeated, even if it had the effect of dissolving the corporation. Section 1066 applies when no circumstances arise that defeat the purpose for which the corporation was organized, and that require an earlier dissolution.

4. Appellant cites cases announcing the familiar rule that a party holding a fiduciary relation to trust property cannot become a purchaser thereof, either directly or indirectly. It is contended that the defendant Holcomb, in voting the majority of the stock, as already stated, stood in the place of the corporation, and was charged with its trust relations towards the stockholders, and therefore within the rule forbidding him from purchasing the property. Mr. Holcomb's relation as a stockholder was not that of agent or trustee, but a joint owner. An agent or trustee is charged with the interests of his principal or *cestui que trust*, and cannot have any interest adverse thereto. Not so, however, as to a stockholder. He has his own interests to protect, and is not charged with the care of the interests of the other stockholders. They act for themselves. The rule applicable to stockholders is well stated in *Rice's Appeal*, 79 Pa. St. 204, as follows: "Where a person has the actual con-

trol of a corporation, whether such control arises from the ownership of a majority of the shares, or from his position or influence, he is held to most rigid good faith. The onus is upon him to show the fairness of the transaction if it is called in question." This brings us to inquire whether appellee Holcomb acted in good faith. It is unnecessary that we extend this opinion by here discussing the evidence on this point. It is sufficient to say that purchasers for such property were not numerous, the sale was advertised and open, it was postponed in hope of securing bidders, the minimum price was fixed, and at an open sale appellee Holcomb made his bid. It is true that the price bid was much less than the cost of the property, but was all it would bring at an open sale, and, in view of the past failures of this new enterprise, may be said to be equal to the then value of the property. We find no evidence of fraud or bad faith in the transaction. What was done was authorized by the circumstances, and was done in good faith, and for the best interests of all concerned. The judgment of the district court is affirmed.*

Corporations. Disposing of the property and winding up the business of the corporation. When justifiable. "The right of a manufacturing company to discontinue its operations where they have become unprofitable, for the purpose of protecting shareholders from further loss, does not admit, we think, of doubt." *Skinner v. Smith*, 134 N. Y. 240, 31 N. E. Rep. 911, citing *Treadwell v. Manf. Co.*, 7 Gray 395; *Hancock v. Holbrook*, 9 Fed. Rep. 353; *Boston etc. R. Co. v. New York etc. R. Co.*, 13 R. I. 263; 1 *Mor. Corp.* § 263 et seq.; 2 *Mor. Corp.* § 1004; *Buford v. Packet Co.*, 69 Mo. 611. To same effect is *Rothwell v. Robinson*, 44 Minn. 533; 47 N. W. Rep. 255. And see generally: *Small v. Minneapolis Electro Matrix Co.*, 4 Am. R. R. & Corp. Rep. 81 and note; *Holmes & Griggs Mfg. Co. v. Holmes & Co., Metal Co.*, 4 Am. R. R. & Corp. Rep. 555; *Central Trans. Co. v. Pullman Palace Car Co.*, 4 Am. R. R. & Corp. Rep. 173; *People v. Ballard*, 6 Am. R. R. & Corp. Rep. 635 and note; 1 Am. R. R. & Corp. Rep. 240 note.

WHITE ET AL. V. MANHATTAN RY. CO., ET AL.

(Court of Appeals of New York. Oct. 3, 1893.)

1. ELEVATED RAILROADS IN STREET. CONSENT OF ABUTTING OWNER NOT HAVING FEE IS IRREVOCABLE AND BARS CLAIM FOR DAMAGES. By

and operated the road. *Held*, that such consent, after being acted on by the company, operated as an abandonment by such owners of their easement in the streets so far as was reasonably necessary for the construction and operation of such road, and that they or their successors in title could not revoke such consent, and recover damages already sustained, and enjoin the further operation of such road.

2. The effect of such consent is not changed by the provision of the constitution art 8, § 18, that no railroad can be built in the public streets without the consent of the owners of one-half in value of the property in the street, or, in lieu thereof, the determination of three commissioners appointed by the general term, after a hearing of all parties interested, and confirmed by the court.

3. SIGNING OF CONSENT IN FIRM NAME BY ONE PARTNER DOES NOT BIND OTHER PARTNERS. Where the land belonged to a copartnership, and the firm name was signed to the consent by one member of the firm, the rights of the other members and their successors in title are not affected thereby, in the absence of evidence of authority to sign it by such other members, or of circumstances from which an inference of authority might fairly be drawn.

4. CONSTRUCTION OF CONSENT. UNREASONABLE USE. Such a consent must have a reasonable construction and cannot be held to authorize an unreasonable or excessive use of the street for the purposes contemplated.

Davies & Rapallo and *Brainard Tolles*, for appellant. *Leo C. Dessar*, (*Joseph B. Reilly*, of counsel,) for respondents.

PECKHAM, J.—On the 28th day of July 1887, the plaintiffs became owners of certain land, with the buildings thereon, situated on Chatham square, in the city of New York. They are respectively the widow and daughter of one James H. White who died on the above date in the possession and ownership of the premises, and who devised the same to the plaintiffs. The railroad of the defendants was at that time in operation in Chatham square, and on the 30th day of July, 1888, the plaintiffs commenced this action for the purpose of recovering damages which they alleged had been already sustained by them from the operation by defendants of the railroad in front of the plaintiffs' premises without having obtained the right to do so from the owners thereof, and also for the purpose of enjoining the defendants from the further operation of the road unless they paid the damage which such operation of it would thereafter occasion to the plaintiffs as the owners of the premises in question. They recovered judgment for both kinds of relief. Upon the trial the defendants proved that in 1875 the premises were owned by the firm of W. M. Seymour & Co., hardware merchants, and the firm was then composed of William M. Seymour, James H. White, and Jonathan E. Brush.

In February, 1877, Brush conveyed his interest in the premises to his partners, Seymour and White, and in March, 1882, the executor of Seymour, under due authority in the will of the testator conveyed the interest in the premiss of which testator died seised to James H. White, the plaintiffs' testator. The defendants further proved that in October, 1875, while the premises were owned by and in the possession of the firm, one of the members thereof (Jonathan E. Brush) signed a paper which read as follows: "We, the undersigned, owners of land bounded on Chatham street, east side, between Roosevelt and East Broadway, hereby respectively consent to the construction and operation of an elevated railway over, through, and along said street; the said railway to be constructed and operated by either the New York Elevated Railroad Company, or a company to be organized under chapter 606 of the Laws of 1875. Dated New York, October, 1875. Street number, 4; ward number, 781; street front, 34.4: owners, Seymour & Co.; residence, ———; valuation, \$20,000; signature, W. M. Seymour & Co." The railroad was constructed subsequent to the execution of this paper, and has been operated as alleged in the complaint. The court was requested to find the fact as to the execution of this paper, and the subsequent construction of the railroad in accordance with the proof, which was uncontradicted, but the request was refused, and an exception duly taken. The principle question in the case arises upon the materiality of this exception.

The plaintiffs insist that the paper was of no more effect than a parol license to do work on the land of the licensor would have been, and that it was revocable at the pleasure of the licensor, and that a revocation was effected by the conveyance of the land, and by the commencement of this action by the devisees of the former owner, James H. White. There is no finding or proof that the plaintiffs have any title to any portion of the street or square upon which their building fronts, but there is a finding that they acquired with their title to the premises the right to have Chatham square kept open as a public street, "and to have a free and unobstructed right of way, access, and passage to and from said premises over and upon said street, together with all the use and benefit of the light and air coming in and upon said lot and premises through and from said street, free and unobstructed." I think the proof shows, without con-

tradiction, that all the rights in the street they had were what has been termed property rights in the nature of easements of light, air, and access. *Story's Case*, 90 N. Y. 122; *Kane's Case*, 125 N. Y. 164; 26 N. E. Rep. 278, and cases cited. The defendants, therefore, insist that, as the plaintiffs or their predecessors had no title to any portion of the street, the consent of their predecessors, while in the possession and ownership of the abutting land, that the defendants might construct and operate the railroad in the square in front of their land, was more than a mere license to do an act on the land of the licensor, and that it amounted in law and in fact to an abandonment of their rights or easements in the street, so far as was necessary for the construction and operation of the railroad, and that, the consent to such construction having been acted on, and large amounts of money expended on the faith thereof, the plaintiffs, as the successors of those who gave the consent, are themselves estopped from making any claim for damages arising from such construction and operation. It has been the law in this state for a number of years that an easement to do some act of a permanent nature on the land of another can be created only by a deed or conveyance in writing, operating as a grant, and that consent in writing on the part of the landowner is no more valid than if it were by parol. Thus a parol agreement by the owner of the land that a person may abut and erect a dam on such land, not for a temporary purpose, but for a permanent use, such as the creation of a water power for the use of mills, is void, and the agreement, being a mere license, may be revoked even after it has been acted upon by the other party. Also a permanent easement to drain through the land of another is not created by a license so to do, even when in writing, and made upon a good consideration. *Mumford v. Whitney*, 15 Wend. 381; *Wiseman v. Lucksinger*, 84 N. Y. 31; *Cronkhite v. Cronkhite*, 94 N. Y. 323; *Babcock v. Utter*, 1 Abb. Dec. 27, and cases cited; *Eckerson v. Crippen*, 110 N. Y. 585; 18 N. E. Rep. 443.

The question of the establishment of an easement by adverse user, which may authorize the presumption of a grant, is not involved, nor is the ability to thus prove its existence denied. *Hammond v. Zehner*, 21 N. Y. 118. It is, however, held (what would otherwise seem to be plain enough) that there can be no adverse user where the right to use exists and is exercised under a license.

Wiseman v. Lucksinger, *supra*. The reasoning upon which these decisions as to the insufficiency of a license are based is that the right which is claimed under a license amounts to an interest in land, and that such interest cannot be created, and cannot pass to another, without a proper conveyance or grant of such interest in writing and under seal, as required by our statute. It is said that a license is a mere authority to enter upon the land and is a sufficient protection to the licensee while it lasts, but that it may be revoked at any time, and after its revocation it cannot be used as a protection for any future acts. It is held that there can be no equitable estoppel which will operate to prevent the revocation of the license, grounded upon the fact that the licensee has entered upon the land of the licensor, and expended thereon labor and money upon the faith of the license, because it must be held that the licensee knew that the license gave him no interest in the land, and that he must rely only upon the indulgence of the licensor, and, if that be withdrawn, he must himself withdraw from the land. Otherwise, it is said, the statute in regard to the creation and conveyance of interests in land would be in great part abrogated. The easements of abutting owners in New York city, who are without title to any portion of the streets upon which their lands abut, differ somewhat in their origin from ordinary easements. They have not been created by grant or covenant, but it is said of them that it is easier to realize their existence than to trace their origin; that they arise from the situation, the course of legislation, the trust created by statute, the acting upon the faith of public pledges and upon a contract between the public and the property owner, implied from all the circumstances, that the street shall be kept open, as a public street, and shall not be devoted to other and inconsistent uses. Kane's Case, *supra*. Whatever the means by which the easements were created, they are in their nature the same as if they had been created by grant. The owners thereof cannot be divested of them without their consent, unless they are compensated therefor. Although it may generally be said, under the authorities of the cases already cited, that an easement in the nature of an interest in the land of another can only be created by a grant, yet after it has been created, and while it is in existence, it may be abandoned, and thus extinguished, by acts showing an intention to abandon and extinguish the same. This has been

many times decided, and by many different courts. A cesser to use, accompanied by an act clearly indicating an intention to abandon the right, would have the same effect as a release without reference to time. *Snell v. Levitt*, 110 N. Y. 595; 18 N. E. Rep. 370, and cases cited in opinion of Earl, J., at page 603, 110 N. Y., and page 372, 18 N. E. Rep. The intention to abandon is the material question, and it may be proved by an infinite variety of acts. If a third party interested in the servient estate has acted upon such abandonment, and in regard to whom it would operate unjustly if the exercise of the easement should be resumed in favor of the dominant estate, added force is given to the claim of abandonment. *Id.* The railroad company, having procured the consent of the authorities of the city to the construction of the railroad in the street or square in question upon the terms agreed upon, such company obtained an interest in, and to a certain extent a title to, the street, for the purpose of the construction and operation of its railroad, which was in the nature of property, and which was sufficient to enable it to treat with abutting property owners in the character of one who had an interest in the servient estate. *People v. O'Brien*, 111 N. Y. 1; 18 N. E. Rep. 692.

The case before us is, therefore, different from those cases where an easement has been claimed to have been created in the land of a third person, by reason of his mere license to enter upon his land and do some act of a permanent nature which would amount, if the right should continue, to an interest in the land of such person. This interest in land, the cases hold, requires a grant. In this case the owners of the abutting land had no title to the street. They had an easement in it only, and their consent purported to carry no title to land. There can be no question that they had the right to release, abandon or otherwise extinguish that easement, and upon such terms as they should think fit. The question before us is whether they have done so, and to what extent, by the execution of the paper proved upon the trial. Assuming that it was executed by each of the parties who owned an interest in the abutting land at that time, what was its effect? The parties were under no obligation of a legal or moral nature to give this consent. There was nothing in the law, nor, so far as appears, in the circumstances surrounding the parties, which called upon the owners to give their consent upon any condition other than that

which operates in all strictly and purely business transactions,—the consideration of benefit to themselves. These owners occupied no public position with regard to their property; they were in no sense trustees, either for the public or for any human being. They represented only themselves and their own interests, and in deciding whether to consent to the building of the road or not they had legally or morally no possible reason for consulting any but their own interests, as they thought they might be affected by the construction and operation of the road. Under such circumstances, when an abutting land owner is confronted with the question whether he will or will not consent to such construction and operation, and he gives in writing a full, unconditional, and absolute consent thereto, where is the reason for saying he did not mean it, but only meant to consent to its construction upon payment of the damages which he might sustain by reason of such construction and operation? That is clearly in direct contradiction of the language used in the instrument here proved. If such has been the intention, it may be asked why it was not so stated. If not so stated, and in the absence of any evidence that such was the understanding of the parties, and that there was a mutual mistake, it seems to me quite plain that effect must be given to the language which was actually used, and that such effect is to create a full and unconditional consent to the building and running of the road, without any claim for damages consequent therefrom.

It is urged that the provisions of the constitution that no railroad can be built in the public streets without the consent of the owners of one-half in value of the property in the street, or, in lieu thereof, the determination of three commissioners appointed by the general term, after a hearing of all parties interested, and confirmed by the court, that the road might be built, has and should have a most material effect upon this written instrument. It is said that the consent is nothing but a kind of public act designed to give the necessary legality to the acts of the company in commencing to construct the road, and that it cannot be held to mean that the owner consents thereto without the right to claim the damage which he may prove as the result of the very acts which he has consented to. I can see no sound foundation for any such construction. The provisions of the constitution are a protection to the abutting landowner so far as they go. They are not abso-

lutely a condition precedent to the construction of the road. If the requisite consents are not given, the company may have recourse to the alternative of a commission appointed by the general term. But in giving the consent, the owner has no public function to perform. It is, as I have already said, an entirely private consideration, for himself. Will I, or will I not, be benefited by the construction and operation of the road? is the only question that he is called upon to decide, and there is nothing in the nature of this question which calls for its decision on any but purely private and individual grounds. If he think he will, on the whole, be benefited, he will in all probability consent, and, if he think the contrary, he will be quite as likely to refuse. If he consent, and subsequently find that he has been mistaken as to the probable benefits, no cause or ground for the recovery of damages from the company arises as the result of his error. When, therefore, an abutting owner consents in writing to the construction and operation of an elevated railroad in the street fronting his property, what other possible meaning can be placed upon such act than that he voluntarily abandons his easement of light, etc., in the street, to the extent to which it will necessarily be affected by the building of the road? The act is capable of but one construction, as it seems to me. He might have consented conditionally, as, for instance, that a majority should also execute such consent, or upon payment of a certain sum, or upon condition of the payment of such damages as he might prove he would sustain from the existence of the road.

In this case, however, there is absolutely no condition stated or claimed. There is the unconditional consent to the building of the road, and, upon the assumption that it was signed by all the owners or duly authorized by them, it must be regarded as an abandonment *pro tanto* of the easement in that street as already described, especially after the consent has been acted upon by the company, with the possible limitation hereinafter to be mentioned.

Perhaps the consenting party might withdraw his consent if he had given it without any valuable consideration, and if the other party had done nothing under it, so that its position would not be unfavorably affected by such withdrawal. This is not such a case, because the company have proceeded to build their road, and they

would be unfavorably affected by just the amount they must pay if the consent be regarded as withdrawn.

The case here shows that the consent in question was not signed by all the owners of the land. The land was owned by these persons as tenants in common, and they were also partners in business. The evidence shows that the name of the firm was signed to the consent by Mr. Brush, and the stipulation of counsel was that in case of the failure to produce certain exhibits used on the trial, upon the argument at general term or in this court, such failure, together with the other evidence in the case, should be taken to establish the genuineness of the signature of the firm upon the consent in question. The exhibits were not produced, and the defendants' counsel claims not only that the genuineness of the signature of the firm to the paper is thus admitted, but he also claims that the proper construction of the stipulation is that the partner who signed the firm name was authorized by the other members thereof so to do. I do not think so. The defendants were endeavoring to prove that the signature of the firm name to the paper was placed there by Mr. Brush, one of the partners, and witnesses were called who knew his handwriting, and had seen him write the signature of the firm to other papers, to show by them that in their opinion he had written the signature in question. The exhibits in question were the books of different banks where the firm kept their accounts, in which the firm name had been written by each of the partners, and also their individual names as aids to enable the bank officers thereafter to identify the firm signature when signed by the different members. All that the stipulation effected was to concede (in the absence of these exhibits) that the firm signature was genuine,—that is, was placed there by one of the members of the firm (Mr. Brush), as defendants were endeavoring to prove. I can see no reason for giving a greater weight to the absence of these exhibits than could possibly be given to them and the other evidence by their presence. If present, all that could have been inferred therefrom was that the defendants, upon the whole evidence, had proved that Mr. Brush, one of the partners, had signed the firm name. We do not think that the defendants have proved that it was signed by the authority of the rest of the firm. It was not a firm matter in regard to which each partner would in his action represent himself and the rest of the firm, but actual

authority would have to be shown or inferred from acts and circumstances in proof. In the absence of evidence of authority, or of circumstances from which an inference of authority might fairly be drawn, we think the owners of the land, other than the one who signed it and his grantees with knowledge, or implied knowledge, would be wholly unaffected by the execution of this paper. We leave this question open for proof upon another trial as to authority.

It is also claimed that the actual occupation of this square by the defendants for their railroad is much greater and more exclusive than any fair construction of the consent would permit. It is said to be unreasonable and excessive under cover of such a license to in fact completely cover the whole street, and to render the latter much less valuable for purposes of light, etc., than could reasonably have been in the contemplation of the parties. Possibly this may be true. We do not now pass upon that question. The courts below, however, have denied all validity to the written consent, and have not confined themselves to a refusal to give effect to it beyond a reasonable extent. We think the consent should have a reasonable construction, and we ought not to hold that such a paper would authorize the building of a solid structure as high as the top of the buildings fronting on the street, and completely covering the same from building to building. This would certainly be regarded by all as not within the contemplation of the parties to the paper. We will not now, and in advance, decide whether the use actually made of the street is or is not unreasonable with reference to this consent. Further evidence may be given upon another trial on this point, from which the question may be more readily determined. We think the courts below, in refusing all possible effect to the consent in question as an abandonment to any extent of the owner's easement in the street, committed an error which requires a reversal of the judgment and a new trial.

All concur, except MAYNARD, J. not voting.*

Street railroads. Consent of abutting owner to construction of road. In various states it is provided by constitution or statute that no railroad shall be constructed in a public street or permit given for such construction by the local authorities, without the consent of the owners of a certain proportion in frontage or value of the property abutting on the street or part of

*Reported in 34 N. E. Rep. 887.

the street occupied. In the absence of any statutory or constitutional provision requiring it no such consent is necessary. *Wiggins Ferry Co., v. East St. Louis Union R. Co.*, 107 Ill. 450. When such consent is required it is indispensable, and no valid right can be obtained without it. If required before the granting of a permit or franchise by the local authorities, it is jurisdictional and a grant without such consent is void. *Bullock v. West Chicago Rapid Transit Co.*, (Horton J.), 28 Chicago Legal News, 147; *Hunt v. Chicago Horse & Dummy R. Co.*, 121 Ill. 638; *Sommers v. Cincinnati*, 8 Am. L. Record, 612; *New York Cable R. Co., v. Forty-Second St. &c. R. Co.*, 18 Daly 118. A statute requiring the consent of abutting owners before a permit is given for the construction, of a street or horse railroad, does not apply to an ordinary steam railroad and the latter may be constructed without such consent. *Wiggins Ferry Co., v. East St. Louis Union R. Co.*, 107 Ill. 450.

As to the form in which consents should be given to be effectual, the decisions are meager. Though required to be in writing, they need not be under seal, nor operate to convey an easement, nor contain in terms a release of damages. *Matter of Courtland & Homer H. R. Co.*, 81 Hun, 72. In *Rapp v. Storrs & Sedamsville R. Co.*, 12 W. L. B. 119 it is held that the object of the law is to get the opinion of the property owner in a matter of public concern and therefore that he must act in person and not through agents. In that case consents were held invalid which were signed by agents though their authority was proven. In the same case it was held that a father could not consent for his daughter, nor the president of a corporation for the corporation, nor a guardian for his ward, nor executors with power of sale for the estate of their testator. It was also held that a life tenant was an owner within the statute and that his consent was good, but that the consent of one tenant in common was wholly ineffectual. As to consents by agents, see also *Bullock v. West Chicago Rapid Transit Co.*, 28 Chicago Legal News, 147; *People v. Smith*, 47 N. Y. 772. Where a consent is signed by an agent without authority, it will be ineffectual even though ratified after the granting of the franchise by the council. *Sommers v. Cincinnati*, 8 Am. L. Record, 612.

It is held that consents may be revoked before any action is taken thereon. *Bullock v. West Chicago Rapid Transit Co.*, 28 Chicago Legal News, 147. In this case the revocations were filed with the council.

Whether the property owners may annex conditions to their consents and whether such conditions will be binding upon the public authorities is an open question. On this point there is a dictum in *People v. West Division R. Co.*, 118 Ill. 118, as follows: "It is true, that the property owners might have inserted such conditions in their assent as they thought proper, and the common council might have been powerless to grant the railroad company permission to occupy the streets except upon the conditions specified by the property owners in their consent, but the paper does not seem to contain conditions."

When the statute requires the franchise to be granted to the one agreeing to carry passengers at the lowest rates of fare and provides for giving notice and receiving bids, it is held that all consents will enure to the successful bidder, even though they are for a road to be constructed by a particular person. *Mathews v. Cincinnati*, 8 W. L. B. 551; *Knorr v. Miller*, 5 Ohio C. C. 609; *State v. Bell*, 84 Ohio St. 194.

The decision of the council that the necessary consents have been obtained is not conclusive, but the fact can be inquired into at the suit of the proper parties in interest. *Bullock v. West Chicago Rapid Transit Co.*, 28 Chicago Legal News, 147.

Under the Ohio statute it was held that where the railroad was to be laid along parts of several streets the entire route was to be considered as a unit, and the consent of property owners representing half the entire frontage was all that was required and that half the frontage of the portion of each street occupied was not necessary. *Rapp v. Storrs & Sedamsville R. Co.*, 12 W. L. B. 119.

It is held that none can complain that the necessary consents have not been given except those who own property abutting on the street or part of street proposed to be occupied. *Simmons v. City of Toledo*, 5 Ohio C. C. 124; *Harrison v. Mt. Auburn Cable R. Co.*, 17 W. L. B. 265; *Sommers v. Cincinnati*, 8 Am. L. Record, 612.

It has been held that consents must be fairly obtained and not bought or procured by some consideration moving to the owner or they will be void. This question was passed upon by ADAMS, J., in *Doane v. Chicago City Ry. Co.*, (Circ. Ct.), 7 Nat'l Corp. Rep. 226.

The general purpose of such statutes is passed upon by ADAMS, J., in the decision last referred to. The defendant desired to construct its railway upon a certain street in Chicago on which the plaintiff owned abutting property. To obtain the plaintiff's consent the defendant entered into a bond to the plaintiff, conditioned that it would never construct upon the part of the street in question anything more than a single track railway without any switch or turnout. The defendant violated this agreement by constructing a second track, and suit was brought on the bond. The court held that the bond was void; *first*, because the promise not to build more than a single track was against public policy, and, *second*, because the plaintiff's consent was invalid, and the promise of the defendant was, therefore, without consideration. The court says: "It was certainly not the intention of the legislature that the consent of any owner might be sold or purchased for a consideration moving to such owner only. This would be to defeat the object of the statute. It is easy to conceive of a case, in which the consent of only one owner remained to be obtained in order to constitute consent of the owners of a majority of the frontage, and that his voice, fairly expressed, and uninfluenced by any consideration, not common to all the abutting owners, would be against the proposed railway. Under such circumstances, the sale by such owner of his consent for a sum of money, or other valuable consideration, would be a fraud on the other owners, and, in my opinion, contrary to the spirit of the statute. It could not, in my opinion, have been intended otherwise by the legislature than that a power so important in its character that without its exercise the city council could not act in the premises, should be exercised fairly and impartially, and uninfluenced by selfish considerations not common to the owners of all property similarly situated."

Since the foregoing was written the same case has been passed upon by the appellate court and the decision of ADAMS, J., upon the point in question reversed. In the appellate court opinion it is said: "The respective owners of private property fronting on Wabash avenue are not a public body;

they neither hold or exercise either legislative, executive, or judicial functions; they are not directly or indirectly selected by the people or removable by them. They are charged with no more duties in respect to the public than are the tenants who occupy their buildings, or the customers who frequent their stores. If they give or withhold their consent to the construction of a street railway before their doors, they do so, not in any public capacity, but as individuals, having regard solely to their individual interests, neither acting collectively or in concert, or after discussion and consideration, but independently and with reference, each for himself, to what he deems his personal interests. They might all be stockholders or directors in the company to which they give such consent; might completely own and control it, and yet their consent be not rendered invalid; because they have in this matter no public interest to protect or serve. * * * In giving or withholding this consent, one may override the objections of a thousand owners whose united possessions do not equal his. The law does not require that in giving or withholding consent the property owner shall be governed by any sense of duty to others; he is not selected by his fellow property owners, has taken no oath of office, entered into no obligation, and may be influenced by a consideration of benefit or harm to lands by him owned upon other streets, or to the stock of the corporation seeking to obtain the right of user; or stock in other companies whose interests are opposed to such use. Pecuniary consideration, other than the payment of money to him, may be all powerful to him and yet neither the public or individuals have against him any cause of complaint. * * * If the property of appellant was damaged by the construction of a horse railroad in front of his premises he was, under the provisions of the constitution of this state, entitled to compensation. Thinking that such construction would be a damage to him he had a right before, and, as a condition of, giving his consent to the laying of such tracks, to bargain and sell the right to damage his property for the largest sum he could obtain." *Doane v. Chicago City Ry. Co.*, 8 Natl. Corp. Rep. 27.

CASCO NAT. BANK v. CLARK. ET AL.

(Court of Appeals of New York. Oct. 3, 1893.)

1. CORPORATIONS. WHEN KNOWLEDGE OF DIRECTOR NOT NOTICE TO CORPORATION. The fact that a director in a bank discounting a note is also a director in a corporation, payee of the note, is not sufficient to charge the bank with knowledge of equities between the parties.

2. NOTE EXECUTED BY OFFICERS OF CORPORATION WHEN NOT BINDING

Henry Daily, Jr., for appellants. *Edward B. Merrill*, for respondent.

GRAY, J.—The action is upon a promissory note, in the following form, viz :

Ridgewood Ice Co.		Brooklyn, N. Y., Aug. 2, 1890.
		\$7,500. Three months after date we promise to pay to the order of Clark & Chaplin Ice Company seventy-five hundred dollars at Mechanics' Bank; value received.
		John Clark, Prest
		E. H. Close, Treas.

It was delivered in payment for ice sold by the payee company to the Ridgewood Ice Company under a contract between those companies, and was discounted by the plaintiff for the payee before its maturity. The appellants Clark and Close appearing as makers upon the note, the one describing himself as "Prest." and the other as "Treas.," were made individually defendants. They defended on the ground that they had made the note as officers of the Ridgewood Ice Company, and did not become personally liable thereby for the debt represented. Where a negotiable promissory note has been given for the payment of a debt contracted by a corporation, and the language of the promise does not disclose the corporate obligation, and the signatures to the paper are in the names of individuals, a holder taking bona fide and without notice of the circumstances of its making is entitled to hold the note as the personal undertaking of its signers, notwithstanding they affix to their names the title of an office. Such an affix will be regarded as descriptive of the persons, and not of the character of the liability. Unless the promise purports to be by the corporation, it is that of the persons who subscribe to it; and the fact of adding to their names an abbreviation of some official title has no legal significance as qualifying their obligation, and imposes no obligation upon the corporation whose officers they may be. This must be regarded as the long and well settled rule. *Byles*, Bills. §§ 36, 37, 71; *Pentz v. Stanton*, 10 Wend. 271; *Taft v. Brewster*, 9 Johns. 334; *Hills v. Bannister*, 8 Cow. 31; *Moss v. Livingston*, 4 N. Y. 208; *De Witt v. Walton*, 9 N. Y. 571; *Bottomley v. Fisher*, 1 Hurl. & C. 211. It is founded in the general principle that in a contract every material thing must be definitely expressed, and

not left to conjecture. Unless the language creates, or fairly implies, the undertaking of the corporation, if the purpose is equivocal, the obligation is that of its apparent makers.

It was said in *Briggs v. Partridge*, 64 N. Y. 357, 363, that persons taking negotiable instruments are presumed to take them on the credit of the parties whose names appear upon them, and a person not a party cannot be charged upon proof that the ostensible party signed or indorsed as his agent. It may be perfectly true, if there is proof that the holder of negotiable paper was aware, when he received it, of the facts and circumstances connected with its making, and knew that it was intended and delivered as a corporate obligation only, that the persons signing it in this manner could not be held individually liable. Such knowledge might be imputable from the language of the paper, in connection with other circumstances, as in the case of *Mott v. Hicks*, 1 Cow. 513, where the note read, "the president and directors promise to pay," and was subscribed by the defendant as "president." The court held that that was sufficient to distinguish the case from *Taft v. Brewster*, *supra*, and made it evident that no personal engagement was entered into or intended. Much stress was placed in that case upon the proof that the plaintiff was intimately acquainted with the transaction out of which arose the giving of the corporate obligation. In the case of *Bank of Genesee v. Patchin Bank*, 19 N. Y. 312, referred to by the appellants' counsel, the action was against the defendant to hold it as the indorser of a bill of exchange drawn to the order of "S. B. Stokes, Cas.," and indorsed in the same words. The plaintiff bank was advised, at the time of discounting the bill by the president of the Patchin Bank, that Stokes was its cashier, and that he had been directed to send it in for discount, and Stokes forwarded it in an official way to the plaintiff. It was held that the Patchin Bank was liable, because the agency of the cashier in the matter was communicated to the knowledge of the plaintiff, as well as apparent. Incidentally it was said that the same strictness is not required in the execution of commercial paper as between banks, that is, in other respects, between individuals.

In the absence of competent evidence showing or charging knowledge in the holder of negotiable paper as to the character of

transactions, was engaged in a fraudulent scheme of conversion. It was said in the latter case that the knowledge of the president as an individual or as an executor was not imputable to the bank merely because he was the president, but because, when it acted through him as president, in any transaction where that knowledge was material and applicable, it acted through an agent. The rule may be stated, generally, to be that where a director or an officer has knowledge of material facts respecting a proposed transaction, which his relations to it, as representing the bank, have given him, then, as it becomes his official duty to communicate that knowledge to the bank, he will be presumed to have done so, and his knowledge will then be imputed to the bank. But no such duty can be deemed to have existed in this case, where the appellants have made and delivered a promissory note, purporting to be their individual promise. If one of the plaintiff's officers did have knowledge—whether individually or as a director of the Clark & Chaplin Company is not material—that the paper was made and intended as a corporate note, his failure to so state to the bank could not prejudice it. It was in no sense incumbent upon him, assuming that he actually participated in the discount, (a fact not shown,) to explain that the note was the obligation of the Ridgewood Company, and not of the persons who appeared as its makers. He was under no duty to these persons to explain their acts, and the law would not imply any. At most it would be merely a case of knowledge, acquired by a director, of facts not material to the transaction of discount by the plaintiff, and which he was under no obligation to communicate. No other questions require discussion, and the judgment rendered below should be affirmed, with costs. All concur.*

1. Corporations. Commercial paper. Form of execution or endorsement to bind corporation. See *Lay v. Austin*. 1 Am. R. R. & Corn.

A corporation is not chargeable with the knowledge nor bound by the acts of one of its officers in a matter in which he acts in behalf of his own interests, and deals with the corporation as a private individual, and in no way represents it in the transaction. *Koehler v. Dodge*, 81 Neb. 328; 47 N. W. Rep. 918. See also *Richmond Railway & El. Co., v. Dick* 8 C. C. A. 149; 52 Fed. Rep. 879.

LOWE v. CHICAGO, ST. P., M. & O. Ry. Co.

(Supreme Court of Iowa. Oct. 16, 1893.)

1. **RAILROAD COMPANIES. UNCOUPLING CARS. INJURY TO BRAKEMAN. WAIVER OF RULE AS TO MANNER OF COUPLING.** A rule of a railroad company prohibiting the uncoupling of cars by going between them while in motion will be held to have been waived by the company where it was the custom of the employees to uncouple cars while in motion, and the practice was open and notorious, and had existed for such a time that its officers were chargeable with notice.

2. **EVIDENCE OF UNEXPRESSED INTENTION OF CONDUCTOR IN CHARGE OF TRAIN.** Whether a conductor intended that a brakeman injured in uncoupling cars should uncouple them at the time he did must be determined from what he said and did at the time and he cannot testify as to what his unexpressed intention was.

3. **CONTRIBUTORY NEGLIGENCE. STEPPING IN BETWEEN CARS.** Whether going in between cars, which are moving, to uncouple them, is negligence, is to be determined from all the facts and circumstances surrounding the act.

4. **NEGLECT OF COMPANY. SUDDEN INCREASE OF SPEED.** To suddenly and without any warning, and without orders from a brakeman between cars uncoupling them, increase the speed of the cars is negligence.


5. **DEATH BY WRONGFUL ACT. MEASURE OF DAMAGES.** In an action for the death of plaintiff's intestate it was proper to instruct that in determining the amount of damages the jury should consider deceased's age and occupation, the wages he was receiving, the condition of his health, his ability to earn money, and therefrom should determine the probable pecuniary loss to deceased's estate caused by his death.

6. It was proper to refuse an instruction that such sum should be allowed as, put at interest, would have amounted to the sum deceased would have accumulated and had at the time of his death had he lived his allotted time according to his expectancy of life.

Swan, Lawrence & Swan, for appellant. *Argo, McDuffie & Argo* for appellee.

KINNE, J.—1. Plaintiff's claim, as set forth in her petition, is substantially this: That she is the administratrix of the estate of one Channing Lowe, deceased; that defendant was, on and prior to November 14, 1891, operating a line of railroad through the

town of Ashton, in this state, at which point it had a main line and certain switches and side tracks ; that at that time and place it was frequently the custom and practice of the defendant, when its trains were behind time, and it desired to detach certain of its cars from those in use on main line and place them on side track, to order, direct and require certain of its servants acting as brakemen to open one of the switches connecting with its main line, and then, while said cars and engine were in motion, to step upon its track, between the cars to be detached, and uncouple them ; that when the cars were being uncoupled it was then and there the duty as well as the custom and practice of the defendant and its servants controlling the movement of the engine and cars to move said train backward very slowly, and at a steady and regular rate of speed, and not to increase the rate of speed at which the cars were being moved, and not to "kick" the cars backward until the the servant of defendant had signalled the defendant's servants in charge of the engine that he had performed the act of uncoupling the cars, and to "kick" the uncoupled cars backward on to the switch ; that on or about November 14, 1891, the defendant employed Channing Lowe as a brakeman, and employed other servants to care for, manage, and control its trains and engines, and instructed Lowe to work under their direction, and to obey their orders, and so he undertook to do ; that at Ashton, while in the employ of the defendant, and acting in the line of duty, as aforesaid, Lowe was directed and ordered to open and place the switch at the north end of the side track on west side of main line, and to uncouple from said train, while in motion, certain cars which defendant had ordered to be placed upon said side tracks ; that Lowe, in obedience to said direction and order, opened the switch, and as said train was being slowly and at a regular rate of speed backed over said switch, he, in the exercise of due care and caution, stepped on to the track between the cars for the purpose of uncoupling them ; that the servants in charge of said train, without waiting for Lowe to uncouple said cars, or to step off from the track to give said signal, and without giving him time to do so, and without waiting for signal, and without signal, carelessly, negligently, and without warning greatly and suddenly increased the speed of the train ; that by reason thereof, and while in the performance of his duty, and while in the exercise of due care and caution, and without




negligence on his part, he was struck and killed by defendant's cars. Defendant admits its corporate capacity, and that it was at the time stated operating its railway as alleged, and denies all other allegations. In a second count, defendant avers that the killing of Lowe was not the result of any negligence on its part, or of its servants or employees, but was the result of, and occasioned by, the careless and negligent acts of deceased. That deceased was at the time of the injury directing the movement of the train, and said train was moved and controlled by his direction only, and in no other or different manner. Deceased, with knowledge that the train was in motion, and of what was being done and to be done with the engine and cars, carelessly and negligently went in between the cars when they were in motion, and voluntarily placed himself in a dangerous place, with full knowledge of the danger incurred, whereby he was injured. In a third count it is averred that Lowe had for a long time prior to his death been in the employ of the defendant as a brakeman, and had full knowledge of the manner of doing the work on defendant's road, and of the rules and regulations governing his duties as such brakeman, and of the practice, customs, and manner of doing said work, and remained in such employment without protest or demand for any change of manner of doing the same, and thereby voluntarily assumed the risk and danger incident to said employment. In a fourth count it is alleged that the accident to Lowe was occasioned by his disobedience of the rules and regulations of the defendant company. That said company had on January 1, 1890, made and published rules prohibiting brakemen from going between cars in motion to uncouple them, and that deceased had a copy of said rules, and that by reason of his disobedience thereof he was killed. So much of the rules as are material in this case are as follows: "The attention of switchmen and brakemen and all other employes of the company whose duty it is to couple cars is called to the following rule of the company: 'Rule 15. Great care must be exercised by all persons when coupling cars. * * * All persons entering into or remaining in the service of the company are warned that the business is hazardous, and that they must assume the ordinary risks attending it. Each employe is expected and required to look after and be responsible for his own safety, as well as to exercise the utmost caution to avoid injury to his

fellows, especially in the switching of cars and in all movements of trains. * * * Getting in between cars in motion to uncouple them, and all similar acts, are dangerous, and in violation of duty, and are strictly prohibited. Employees are warned that if they commit them it will be at their own peril and risk.' " Plaintiff denied the allegations in the third and fourth counts of the answer, and, further replying, said that, notwithstanding the rules of defendant company, defendant and its officers and servants in charge of its trains have required and directed decedent to perform the services mentioned in the petition, and in the manner therein stated. That at the time plaintiff's intestate received the injuries complained of it was impossible to operate and run defendant's trains in conformity to said rules, and perform the train service required of its servants in operating the trains, which was then known to defendant, and defendant has thereby waived the observance of said rules on part of plaintiff's decedent. That decedent received his orders to set out on the side track the car mentioned in the petition from an officer of the defendant company by means of a telegram received by the conductor in charge of the train, and which was read in the presence and hearing of the deceased.

2. It is said that the court erred in not stating the issues fully and correctly to the jury. It is contended that the court ignored the second and third defenses pleaded in the answer. We do not think the claim is well founded. True, the court might have stated the defenses more fully, and it would have been proper to have done so. The court told the jury that defendant claimed that the negligence of deceased caused the injury, but did not refer to the facts pleaded upon which said claim of negligence was based. We do not think that the failure of the court to be more specific worked any prejudice to the defendant.

3. Evidence was admitted, over defendant's objection, to the effect that it was the habit or custom of brakemen on defendant's road to go on to the track and between the cars when in motion for the purpose of coupling and uncoupling them. It is urged that the evidence is immaterial, incompetent, and that there was no such issue. The evidence was admissible, as tending to show a waiver of rule 15, which prohibited brakemen from going between the moving cars to couple or uncouple. The contention is



that the evidence did not, as a matter of law, establish a waiver of the rule; that, as deceased had a copy of the rule, he was in duty bound to do the work in accordance therewith; and the fact that other employes disobeyed it was no excuse for plaintiff's decedent to do so. That railroad companies have the right to make and promulgate proper and reasonable rules for the government of their employes in the transaction of the business intrusted to them is well settled, and it is likely there might be cases where they would be derelict in duty if they failed to establish such rules. *Deeds v. Railroad Co.*, 74 Iowa, 154; 37 N. W. Rep. 124; *Cooper v. Railroad Co.*, 44 Iowa, 138; *O'Neill v. Railroad Co.*, 45 Iowa, 547; *Railroad Co. v. Powers*, 74 Ill. 844; *Lockwood v. Railroad Co.*, 55 Wis. 50; 12 N. W. Rep. 401; *Reed v. Railroad Co.*, 72 Iowa, 166; 33 N. W. Rep. 451; *Pennsylvania Co. v. Whitcomb*, 111 Ind. 12; 12 N. E. Rep. 380; *Sedgwick v. Railroad Co.*, 73 Iowa, 158; 34 N. W. Rep. 790; *Beach*, Cont. Neg. § 141. A rule prohibiting the coupling and uncoupling of cars by going between them while they are in motion is reasonable, and, if enforced, is calculated to protect the limbs and lives of those whose duty it is to perform the always dangerous work of coupling or uncoupling cars. But we cannot doubt that such a rule may, by the consent of the parties, be waived or abrogated. Let it be conceded that by receiving a copy of the rules and entering the company's service the deceased became bound by contract, and under obligations to obey the rules given him, nevertheless the parties to the contract were competent to waive the performance of any part of it. Such a waiver may arise from constant violation of the rule or contract, acquiesced in by the defendant company. There is a conflict in the cases, some of them holding that a usage or custom cannot be shown as against a rule or contract like that under consideration; but we think it is clear that it is competent to show a usage or custom on the part of the employes of defendant at variance with and in violation of such a rule, when defendant has, through its proper officers, knowledge of its violation, and their conduct shows that they acquiesced in such violation. The following authorities support this view: *Railroad Co. v. Nickels*, 1 C. C. A. 625; 50 Fed. Rep. 718; *Railway Co. v. Springsteen* (Kan.), 21 Pac. Rep. 776; *Prather v. Railroad Co.* (Ga.), 9 S. E. Rep. 530; *Hissong v. Railroad Co.* (Ala.), 8 South


Rep. 777 ; Bonner v. Beam (Tex. Sup.), 15 S. W. Rep. 799. Nor need it appear that the officers of the defendant who are charged with the enforcement of its rules had actual knowledge of the custom of the defendant's employes as to violating the rule. Such notice or knowledge may be inferred from circumstances ; it may be implied from the notoriety of the custom, whereby they are chargeable with notice. Lawson, Usages & Cust. § 21 ; Barry v. Railroad Co. (Mo. Sup.), 11 S. W. Rep. 309. The evidence satisfies us that it was the custom of defendant's employes to couple and uncouple cars while in motion, that this practice was open and notorious, and had existed for such a length of time as that defendant's officers were chargeable with notice of it. It does not appear that those officers of defendant whose duty it was to make rules, and who may therefore be presumed to be especially responsible for their faithful observance by those under their control, have done anything to cause their enforcement. If rules are made in good faith, and for the protection of the company's employes, that protection can be best obtained by compelling their observance while the party is alive for whose benefit they are made. Defendant cannot shield itself from liability by relying upon a rule which, under the evidence, it should know has been constantly violated, and where it may be properly assumed that it acquiesced therein.

4. Defendant asked one Maynard, who was conductor of the train which killed the decedent, these questions : " Was it your intention, as conductor and manager of that train, that Mr. Lowe should uncouple those cars , and go up there to set out that car at the time when he did so ? " " Now, for the purpose of setting out the car which you had instructions to leave at Ashton, and for clearing the main line for the passing of the passenger train, what movements of your train did you propose to have done to accomplish that purpose at the time ? " This evidence was inadmissible. Both questions called for an expression of the undisclosed intention of the conductor with reference to the setting out of the car. There is no pretense that the intention of the conductor in that respect was ever communicated by him to the decedent or to any one else prior to the accident. Lowe could not be charged with the violation of an order conceived in the mind of his superior officer, but never

communicated to him. The order to set out the car was in the form of a telegraphic message to the conductor. It was read by him to and in the presence of the brakemen. No express direction was given to Lowe to attend to setting out the car, but he undertook to do the work. What the conductor intended to do with reference to setting out the car must be determined from what he said and did; further than that it is impossible to go. To admit evidence of unexpressed intentions in such a case would be entering a field not warranted by reason or authority.

5. Regardless of the rule heretofore spoken of, it is said that plaintiff should not recover, because decedent's negligence contributed directly to produce the injury complained of. We have seen that the jury were warranted in finding that the rule prohibiting brakemen from going between the moving cars to couple or uncouple them was waived. It is clear that they so found, as the court instructed them that, if the rule had not been waived, plaintiff could not recover. The claim of appellant is that the act of decedent in going in between the moving cars to uncouple them was negligent as a matter of law. Now, going in between moving cars to couple or uncouple them is not necessarily a negligent act. Whether such an act constitutes negligence is to be determined from all the facts and circumstances surrounding its execution. *Henry v. Railway Co.*, 75 Iowa, 86; 39 N. W. Rep. 193; *Beems v. Railroad Co.*, 58 Iowa, 150; 12 N. W. Rep. 222. The question of decedent's negligence was fairly submitted to the jury. They must have found that he was not guilty of any negligence which contributed to produce the accident, otherwise their verdict would have been for the defendant. Now, it appears that no direction was given to Lowe to set out the car at Ashton. The conductor had before the train reached Ashton, received the message ordering the car set out, and had read it to the brakemen. When he read it he said to them, "We will set out that head stock car." No other or further order was given as to setting out the car. When the train arrived at Ashton the conductor and two of the brakemen proceeded to unload freight, and Lowe informed the engineer of the order to set out the car. He then cut off the stock car, signalled the engineer to go ahead. Fourteen or fifteen cars were left standing on the main track; six cars were cut off with the engine. Lowe went over to the switch, and gave the

engineer a signal to stop. The train stopped. Lowe threw the switch, and gave the signal to back up. He then went in between the cars to uncouple the stock car. The cars were at first backed up slowly, and then, without any further signal from Lowe, the engineer gave the cars a "kick," and soon thereafter Lowe's body was discovered under the moving cars. From the evidence it does not appear that it was the special duty of any particular member of the train crew to place cars upon the side track. Sometimes the work was performed by the conductor and a brakeman, sometimes by two brakemen. Lowe, in connection with the engineer, undertook to carry out the order in accordance with the telegram read to the brakeman by the conductor. It is certain that in so doing he was not a mere volunteer, but a servant of defendant, performing an act within the line of his employment, and duty. He might have uncoupled the car before he threw the switch, or after they had passed upon the side track, and in either case the cars would not have been moving; but the evidence shows that that was not the usual way of doing. He proceeded in the manner usual and customary with defendant's employees. It appears also that to have uncoupled before throwing the switch, or after the cars had passed upon the side track, would have required more time than to uncouple while the cars were in motion. The evidence shows that when Lowe passed in between the cars to uncouple they were moving about as fast as a man would walk, and that the kick was given and speed rapidly increased, without any orders from Lowe. It also appears that there was a rule of the defendant company, known to all its employees, forbidding any freight train from occupying the main track within ten minutes of the time when a passenger train was due. There was only nine minutes after the freight train arrived at Ashton in which to unload its freight, set out the stock car on the side track, return with the engine and cars to the main track, and place the freight on the side track. The freight train was late. It was of the utmost importance that it be moved from the main track to make way for the passenger train, which was due in nineteen minutes after the arrival of the freight at Ashton. It must be presumed that Lowe acted with knowledge of the rule, and realized the necessity of prompt action, in order that the work might all be accomplished within the nine minutes. In view of these and other facts which



might be stated, it was for the jury to say whether Lowe was negligent in attempting to uncouple the cars by going in between them while they were moving. They have said that he was not guilty of negligence in so doing, and we think they were warranted in so finding under all the facts and circumstances in evidence. The question of Lowe's negligence was one of fact to be determined by the jury. *Whitsett v. Railway Co.*, 67 Iowa, 158; 25 N. W. Rep. 104; *Tabler v. Railroad Co.*, 93 Mo. 79; 5 S. W. Rep. 810; *Baldwin v. Railroad Co.*, 72 Iowa, 45; 33 N. W. Rep. 356.

6. Was defendant negligent in suddenly increasing the speed of the train after Lowe had gone in between the cars for the purpose of uncoupling them? This question was fairly submitted to the jury, and they found against the defendant. If the declarations of the engineer were properly received in evidence (and that they were is not questioned in appellant's argument), the jury were justified in their finding. One Regan testified to statements made by the engineer, as follows: "Well, as we were walking along, as I said, he overtook me going up, and I didn't know at that time that he was the engineer, until we spoke to each other, and I asked him if the man was killed, and he says he was. And I says, 'How did it happen?' He says to me: 'I was looking out of the cab window,—the east cab window,—and the fireman was looking on the west side, and he said the man was on the west side.' He says to the fireman, 'What is he saying?' and he answered him, he said, 'He is not saying anything.' At the same time he held up his hand, and made a motion that way [holding the hand up and shaking it sidewise]. I didn't know what it meant. 'I don't know what he says,' he said. 'I think he wants a little kick; give him a little kick?' and he says, 'I gave it to him.' Those words he used exactly. Question. Who made the gesture that you refer to? Answer. The engineer, as I supposed he was the engineer. I took it by that from what he said." These statements were made by the engineer to the witness immediately after the accident happened, and prior to the taking of Lowe's body out from under the train. From the evidence it is clear that the jury were warranted in finding defendant's negligence was established. The train was under Lowe's orders when the car was being set out. The fireman knew that Lowe was in between the cars. He knew he had given no order to increase the speed

of the train, and recklessly, and without any warning, and without regard to Lowe's safety, the cars were kicked, the speed increased. It was an act of gross negligence, uncalled for, and without justification. Whether this act was the cause of Lowe's death is a question, we think, not free from doubt; but the verdict is not so wanting in support by the testimony as to warrant us in disturbing it.

7. It is urged that the damages are excessive, and not warranted by the evidence. The verdict was for \$5,000. The court instructed the jury as follows: "Par. 7. If you find for the plaintiff, then you will determine, from all the evidence before you, what amount you will allow her as damages resulting to the estate of the deceased by reason of his death; and in determining what amount you will so allow you should take into consideration the age of the deceased, his occupation, the wages he was receiving, the condition of his health, his ability, if any, to earn money, and all these in connection with all the evidence before you, and determine therefrom the probable pecuniary loss to the estate of the deceased, caused by his death, and allow plaintiff such sum, and such only, as will compensate the estate for such loss." The instruction is not objectionable, nor was it error to refuse the one asked by the defendant. The instruction asked lays down the doctrine that to determine the loss the decedent's estate has sustained the jury must ascertain from the evidence the amount he "would accumulate and have over and above his liabilities at his death if he had lived the allotted time as shown by the evidence to be his expectancy of life, and then allow such sum as, placed at legal interest for that time, would produce a like sum." The evidence showed that the deceased was in good health, twenty-five years old, and was at the time of his death earning \$55 per month; that he left a wife and three children; that he had been braking for five years; that his family depended entirely upon him for support; that he left no estate; that it took all his wages to support his family. It is impossible to measure with any degree of exactness just what the actual pecuniary loss in such a case is. We are not disposed to measure the damages in such cases by an ironclad rule, nor are we inclined to take a step in advance of what we have heretofore held. We think the rule as repeatedly approved by this court is fair and just. We need not review our decisions touching this

question. That was done to some extent in the recent case of *Wheelan v. Railway Co.*, 52 N. W. Rep. 120, wherein appellant urged that an instruction was erroneous for substantially the same reasons now pressed. The instruction given is in substance, the same as many that have heretofore met the approval of this court and we are not justified in holding that the court below erred in refusing to give one more definite so long as the one given is correct. The damages were not excessive.

The judgement below is affirmed.*

RAILROAD COMPANIES. INJURIES TO EMPLOYEES IN COUPLING CARS.

1. Having different devices for coupling in use at same time, whether negligence.—It is not negligence *per se* for a railroad company to adopt a device for coupling cars, not before in use on its road, without discarding those already in use by it, although the use of the two together may be more hazardous than would the use of either alone. That the railroad company may exercise this right is a risk incidental to the service of one who is engaged in coupling cars; and, if the sole cause of an injury to one so engaged be the concurrent use of the two devices, it imposes no obligation on the railroad company to compensate him therefor. *Pittsburgh etc. R. Co. v. Henley*, 48 Ohio St. 608; 29 N. Y. Rep. 575. To same effect *Norfolk & W. R. Co. v. McDonald's Admr.*, 88 Va. 352; 13 S. E. Rep. 706.

2. Defects in coupling apparatus.—Plaintiff was injured while coupling an engine to a car because there was not sufficient space for his body between them. The draw-bars of the engine and of the car were unusually short, leaving a space of only about 10 inches between the end of the car and of the engine when the draw-bars came together, whereas the usual space is from 24 to 30 inches. Held sufficient to justify a verdict that defendant's negligence was one of the proximate causes of the injury. *Bennett v. Northern Pacific R. Co.*, 2 N. D. 112; 49 N. W. Rep. 408.

Where plaintiff, a brakeman in the employ of defendant, had his hand crushed while attempting to make a coupling between two cars, he cannot recover for his injuries on the ground that the draught irons on the two cars were at different heights, when there is no evidence that this fact contributed to produce the accident. *Kruse v. Chicago etc. R. Co.*, 82 Wis. 568; 52 N. W. Rep. 755. Where the evidence shows that a drawbar supplied by a railway company to be used in coupling cars was used on two occasions, working well on the first, but failing to work on the second though twice tried in a proper manner, a jury might, in the absence of any explanation from the company, infer that the implement was defective. *Ousley v. Central R. & B. Co.*, 86 Ga. 538; 12 S. E. Rep. 988. Where a brakeman was injured while attempting to uncouple cars in consequence of a broken draw-bar, which was known to the conductor, the failure of the conductor to notify the brakeman of the

*Reported in 56 N. W. Rep. 519.

defect was held to render the company liable. *Donahue v. Old Colony R. Co.*, 153 Mass. 856; 26 N. E. Rep. 868.

3. Defects in cars. Absence of bumpers. Foreign car.—Where a brakeman is crushed through the absence of bumpers on the cars he is called upon to couple on a dark night, of the condition of which he could not have previously informed himself, the company is liable, whether such cars belong to it or to another railroad, and are being transported by it. *Mason v. Richmond & D. R. Co.*, 111 N. C. 482; 16 S. E. Rep. 696.

4. Defective track.—A railroad company is liable for injuries sustained by a yard-master coupling cars, which resulted from the defective condition of a set of platform scales, over which its trains are accustomed to pass, though owned by and built upon the land of a coal company. *Little Rock etc. R. Co. v. Cagle*, 58 Ark. 847; 14 S. W. Rep. 89. Cases of injury by reason of obstructions on track are *Cincinnati etc. R. Co. v. Mealer*, 1 C. C. A. 633; 50 Fed. Rep. 725, and *Texas & P. R. Co. v. Robertson*, 82 Tex. 657; 17 S. W. Rep. 1041.

5. Negligence in operating engine.—In an action by an employe against a railroad company for personal injuries, plaintiff's evidence showed that he was about to couple the engine to cars on a spur track; that he was riding on the pilot of the engine, which was running fast, and when within a few feet of the flat cars, and while plaintiff was raising the pilot bar to couple it, the engineer suddenly, and without warning checked the engine, which threw plaintiff forward, and caused him to miss the coupling, and brought him between the cars, where his arm was crushed. The evidence for defendant showed that the speed was slow, and that the injury was caused by plaintiff attempting to adjust the coupling pin of the car while standing on the pilot, and while the engine was still in motion. Held, that the question of negligence was for the jury. *Baltzer v. Chicago, etc. R. Co.*, 88 Wis. 459; 53 N. W. Rep. 783.

An injury to a railway brakeman while engaged in coupling cars, caused by a co-employe, having charge of an engine, backing it up against cars standing on a siding, with such force as to drive them back upon one of the cars which the brakeman was coupling, is within the risks incident to his employment. *Berrigan v. New York, L. E. & W. R. Co.*, 131 N. Y. 582; 80 N. E. Rep. 67. See also *Rutledge v. Missouri Pac. R. Co.*, 110 Mo. 312; 19 S. W. Rep. 88.

6. Negligence of fireman in transmitting signals.—Where it is the duty of firemen to receive signals from switchmen coupling and uncoupling cars, and to transmit them to the engineer, the railroad company is liable for injuries to a switchman caused by the fireman's failure to transmit a signal. *Richmond & D. R. Co. v. Jones*, 92 Ala. 218; 9 So. Rep. 276. To same effect, *Richmond & D. R. Co. v. Rudd*, 88 Va., 648; 14 S. E. Rep. 861.

7. Failure to give instructions as to proper mode of coupling and the like.—In an action by a brakeman against a railroad company for personal injuries, plaintiff's testimony was that he was a green hand; that the accident occurred five or six days after entering upon his duties, and while coupling cars equipped with double deadwoods; and that he had never before seen cars thus equipped. He had not been warned as to the danger, and had been told how to use cars fitted with single deadwoods. Held, that, as the company

should have properly instructed him, it was error to direct a verdict for defendant at the close of plaintiff's evidence. *Reynolds v. Boston & M. R. Co.*, 64 Vt. 66; 24 Atl. Rep. 184. The fact that the cars were foreign cars was held to make no difference. The following are also cases based upon a failure of the defendant to properly instruct the plaintiff: *Dysinger v. Cincinnati etc. R. Co.*, 98 Mich. 646; 53 N. W. Rep. 825; *Hughes v. Chicago etc. R. Co.*, 79 Wis. 264; 48 N. W. Rep. 259; *Cincinnati etc. R. Co. v. Mealer*, 1 C. C. A. 633; 50 Fed. Rep. 725.

8. Failure to make and enforce proper regulations.—A railway company is not liable to an employee for injuries sustained by him in making a coupling on the ground of its failure to make regulations which might have prevented the accident causing such injuries, where the accident was occasioned by circumstances which could not have been reasonably anticipated, and where a compliance with the general body of rules and the exercise of ordinary care and prudence by the employee would have avoided it. *Berrigan v. New York, L. E. & W. R. Co.*, 181 N. Y. 582; 30 N. E. Rep. 57.

9. Where coupling not in line of plaintiff's employment but he is commanded to act by his superior. In an action against a railroad company for personal injuries the declaration alleged that plaintiff was employed as a common laborer on a gravel train, and that he was ordered by the foreman to uncouple two cars of the train and then to jump from one to the other while one or both were in motion; that when he attempted to do so the foreman, without warning, let off the brake, and thus increased the risk so that when plaintiff jumped he fell between the cars and was injured. It further alleged that this work was not in the line of plaintiff's employment; that he had had no experience on it, and was not acquainted with the inherent danger, but did as he was told for fear of being discharged. *Held*, that the declaration stated a cause of action. *Erickson v. Milwaukee, etc., R. Co.*, 88 Mich. 281, 47 N. W. Rep. 237. But see *Hogan v. Northern Pac. R. Co.*, 58 Fed. Rep. 519.

10. Cars loaded with projecting timbers, rails, etc. Plaintiff's intestate, a brakeman, was killed by being struck by logs which projected over the ends of cars which he was attempting to couple. Defendant offered evidence to show that deceased, who had made only a few trips on that branch of the road, had been cautioned against the danger of coupling cars loaded with logs, and put in evidence a rule of the company calling attention to the fact that logs often projected over the ends of the cars, and forbidding coupling by hand. Deceased was coupling in that manner when the accident occurred. Deceased was furnished with a copy of the rules, and promised to become familiar with and be governed by them, and in the presence of an officer of the company he read the rules above referred to. *Held*, that defendant was not responsible for the death of deceased. *Brennan v. Michigan Central R. Co.*, 98 Mich. 156; 53 N. W. Rep. 858. But see *Jacksonville, etc., R. Co. v. Galvin*, 29 Fla. 636; 11 So. Rep. 281.

11. Contributory negligence. *Violating rules of company.* It appearing that plaintiff was injured in consequence of his failure to obey the rule of defendant that he must examine so as to know the kind and condition of the coupling apparatus, the rule giving him sufficient time to make such examina-

tion in all cases, *held*, that he could not recover. *Bennett v. Northern Pac. R. Co.*, 2 N. D. 112; 49 N. W. Rep. 408.

A rule of a railroad company, prohibiting switchmen from going between cars to couple or uncouple them, cannot be invoked to defeat the action of a switchman for injuries sustained when coupling cars while standing on a running-board put on the tender of an engine for switchmen to ride on. *Richmond & D. R. Co. v. Jones*, 92 Ala. 218; 9 So. Rep. 276.

A switchman undertook on a dark night, in accordance with the order of the yard master, to couple a moving freight car propelled by an engine with defective cylinders. He carried his lantern on one arm, and, when the moving car was about eight feet distant from the stationary car, he stepped in between the rails, grasped the link attached to the moving car, and walked back towards the stationary car until he came within about eighteen inches of it, when the defective cylinders of the engine emitted such unusual volumes of steam that he could not see anything. He immediately dropped the link, and started to escape. As he did so, he raised his arm, and the deadwoods caught and crushed his wrist. He saw the double deadwoods on the moving car as he stepped in front of it, but, owing to the darkness, could not see them on the stationary car, and did not know that there were double deadwoods on that car until they caught his wrist. *Held*, that the facts did not so clearly prove contributory negligence on the part of the switchman that it was the duty of the court below to give the jury a peremptory instruction in favor of the defendant. *Northern Pac. R. Co. v. Nickels*, 1 C. C. A. 625; 50 Fed. Rep. 718.

It is not negligence for a servant to go between cars, contrary to rules of the railroad company, when the duty required cannot otherwise be performed. *Memphis & C. R. Co. v. Graham*, 94 Ala. 545; 10 So. Rep. 288. But otherwise it is negligence. *Ibid*.

Violating rules of company. What amounts to waiver of rules. The mere disregard by an employe of a rule of a railroad company in relation to the coupling of cars, when, with the knowledge and acquiescence of the division superintendent of the road, such employe, and others coming under the rule, have constantly and without exception disregarded it, is not such negligence on the employe's part as will absolutely defeat his recovery for an injury caused by the negligence of the company. *Northern Pac. R. Co. v. Nickels*, 1 C. C. A. 625; 50 Fed. Rep. 718. Evidence is admissible in such case to show that the rule had been disregarded with the knowledge and acquiescence of the division superintendent, even where the employe had signed a paper which set out the rule, and which contained a notice that all rules of the company would be violated at the risk of the employe, and that all such violations, whether habitual or otherwise, were not consented to or acquiesced in by the company. *Ibid*. *Alcorn v. Chicago & A. R. Co.*, 108 Mo. 81; 18 S. W. Rep. 188, is to the same effect as the last case.

Where a railroad brakeman enters into an agreement with the company waiving all liability for injuries resulting from any infraction of a rule of the company prohibiting brakemen from coupling cars except with a stick, and forbidding them to go between the cars to couple, an order by the brakeman's

conductor, directing him to go between the cars to couple whenever he fails in an effort to couple with a stick, is a waiver by the company of the brakeman's agreement. *Mason v. Richmond & D. R. Co.*, 111 N. C. 482; 16 S. W. Rep. 698.

A rule of a railroad company forbidding employees from going between cars in motion to uncouple them is reasonable and "wholesome." Since this rule is clear and explicit, evidence that for many years it had been the custom of brakemen to go between cars in motion to make uncouplings was inadmissible to show that the rule, not having been insisted on, was not binding on deceased. *Memphis & C. R. Co. v. Graham*, 94 Ala. 545; 10 So. Rep. 283.

Going between cars to make coupling. In an action by a brakeman for injuries received while coupling cars it appeared that it was dangerous to go between the cars because they had short drawheads and no bumpers, which was known to plaintiff, and that it was usual to make couplings by so placing the pin that it would fall into place when the cars came together, or by using a stick. At the time of the accident plaintiff went between the cars to be coupled, which were one foot apart, and at a point from which he could not see the engineer, and while adjusting the coupling pin the cars came together, and caught him between them. *Held*, that the injury resulted solely from plaintiff's carelessness. *Long v. Coronado R. Co.*, 96 Cal. 269; 31 Pac. Rep. 170.

Walking on track between cars to be coupled. A brakeman riding on a switch-engine, and directing its movement towards cars to be coupled, is guilty of negligence in jumping off and walking before it on an unballasted track, while removing the coupling link and pin from the draw-head on the tender. *Finnell v. Delaware, L. & W. R. Co.*, 129 N. Y. 669; 29 N. E. Rep. 825. See also *Ellison v. Trusdale*, 49 Minn. 240; 51 N. W. Rep. 918.

Effect of knowledge of defects in cars, apparatus, roadbed, etc. Where a train man continues in the employ of the railroad company after full knowledge that the cars are defective in construction and the train force deficient in number, he assumes the risk arising therefrom, and cannot recover in an action for personal injuries caused thereby. *Long v. Coronado R. Co.*, 96 Cal. 269; 31 Pac. Rep. 170.

A railroad brakeman, who, in coupling cars, with knowledge that the couplings are mismatched, places the pin in the moving car, and remains between the two cars to shake the pin into position, when he might have safely made the coupling by placing the pin in the standing car and permitting it to be shaken into position by the concussion of the two cars, is guilty of negligence, and no recovery can be had for his death resulting from being crushed between the two cars. *Norfolk & W. R. Co. v. McDonald's Admr.* 88 Va. 352; 13 S. E. Rep. 706.

Effect when defect is patent but not known. A railway switchman, while uncoupling moving cars, at night, was injured by reason of his foot being caught between switch-rails insufficiently blocked. He was familiar with the yard and tracks where the accident happened, and with the methods pursued by the railway company in blocking its tracks, but had no actual knowledge of the defective block. *Held*, that the question of his negligence under the circumstances, was for the jury. *Alcorn v. Chicago & A. R. Co.*, 108 Mo.

81; 18 S. W. Rep. 188. To the same effect are *Reynolds v. Boston & M. R. Co.*, 64 Vt. 66; 24 Atl. Rep. 184; *Wells v. Denver & R. G. W. R. Co.*, 7 Utah, 482; 27 Pac. Rep. 688.

MERCHANTS' NATIONAL BANK V. CITIZENS' GASLIGHT CO., ET AL.

(Supreme Judicial Court of Massachusetts, October 19, 1898.)

1. CORPORATIONS. STATUTE RESTRICTING POWER TO ISSUE BONDS NOT APPLICABLE TO PROMISSORY NOTES.—The statute of Mass., 1886, c. 346, § 3, which forbids gaslight companies from issuing bonds in an amount exceeding their capital stock, does not affect the right of such a company to issue notes when necessary in its business.

2. POWER OF TREASURER TO BIND CORPORATION BY ISSUE OF NOTES.—A corporation is liable on one of its notes, in the hands of a bona fide purchaser before maturity, where it is signed by an officer authorized generally to give notes in its behalf, though such officer, in signing the particular note in question, exceeded his authority or the powers of the corporation.

3. The decisions of this court are to the effect that the treasurer of a trading or manufacturing corporation is clothed, by virtue of his office, with the power to execute notes in behalf of the corporation, so as to make them binding on it when in the hands of innocent purchasers before maturity, and this rule applies to gaslight companies, the business of which requires the use of credit at certain seasons of the year. FIELD, C. J., and ALLEN, J., dissenting.

4. EFFECT OF IRREGULARITY IN ELECTION OF TREASURER UPON VALIDITY OF NOTES.—The decisions of this court are to the effect, a corporation which has permitted a person to act as its treasurer for several months, without objection by it or its stockholders, cannot, when sued on a note executed by him in its behalf, set up the defense that his election was invalid, because the annual stockholders' meeting at which he was chosen was not called in accordance with the by-laws.

ACTION of contract by the Merchant's National Bank of Gardiner, Me., against the Citizens' Gaslight Company of Quincy and others, on a note executed in its behalf by C. S. J. Ruggler, as its treasurer. There was a verdict in plaintiff's favor, and defendant, the Citizens' Gaslight Company, excepted to the court's refusal to rule as requested.

Hollis B. Bailey and *William G. Waitt* for plaintiff. *William L. Putman*, for defendants.


BARKER, J.—1. The defendant's first request for instructions relates to the effect of St. 1886, c. 346, upon the powers of the defendant corporation to issue promissory notes. The third section

of that statute relates to the issue of bonds by a gas company, and gives a company the right to secure bonds issued in accordance with the provisions of the section by a mortgage of the franchise and property of the company ; but we find nothing in the chapter which affects the right of such a company to issue promisory notes when convenient or necessary in the prosecution of its business.

2. As the plaintiff discounted this note before maturity, "in the usual course of its business, without notice or knowledge of any defect or infirmity," and as its good faith is not questioned if the note were signed by an officer authorized generally to give notes in its behalf the defendant company would be liable, although the agent in signing this particular note exceeded his authority, or the powers of the corporation. *Monument Nat. Bank v. Globe Works* 101 Mass. 57. It is not necessary that the authority of an officer or agent to sign notes in behalf of a corporation should appear in the by-laws, or should have been expressly given by a vote of the directors or of the stockholders. In *Lester v. Webb*, 1 Allen, 34 it was said. "The rule is well settled that if a corporation permit their treasurer to act as their general fiscal agent, and hold him out to the public as having the general authority implied from his official name and character, and by their silence and acquiescence suffer him to draw and accept drafts, and to endorse notes payable to the corporation, they are bound by his acts done within the scope of such implied authority. *Fay v. Noble*, 12 Cush., 1 ; *Williams v. Cheney*, 3 Gray, 215 ; *Conover v. Insurance Co.*, 1 N. Y. 290. On the facts proved at the trial the plaintiff might well claim, if the jury believed the evidence, that the treasurer had authority to indorse the notes in suit derived, not from any express direction, but from the course of conduct and dealing of the treasurer with the knowledge and implied assent of the directors of the corporation." See, also, *McNeil v. Chamber of commerce*, 154 Mass. 285 ; 28 N. E. Rep. 245 ; *Mining Co. v. Anglo-Californian Bank*, 104 U. S. 192.

3. But cases where the actual authority of an officer is inferred from a course of business known to and permitted by the stockholders or the directors of a corporation do not touch the question whether authority is to be implied as matter of law from the name and nature of the office itself. In the present case the jury were instructed that the treasurer of such a corporation as the defend-

ant company has, by virtue of his office, authority to sign a note which shall bind the corporation, and the defendant contends that this instruction was incorrect. The incidental powers of some officers or agents have become so well known and defined, and have been so frequently recognized by courts of justice, that certain powers are implied as matters of law in favor of third persons who deal with them on the assumption that they possess these powers, unless such persons are informed to the contrary. The officers and agents usually mentioned in this category are auctioneers, brokers, factors, cashiers of banks, and masters of ships. See *Merchant's Bank v. State Bank*, 10 Wall. 604; *Case v. Bank*, 100 U. S. 446. Treasurers of towns or cities in this commonwealth are well-known officers, and their powers are very limited. They are in general to receive, keep, and pay out money on the warrant of the proper officers of the towns and cities. Treasurers of business corporations usually have much more extensive powers, and the decisions of this court hold that the treasurer of a manufacturing and trading corporation is clothed by virtue of his office with power to act for the corporation in making, accepting, indorsing, issuing, and negotiating promissory notes and bills of exchange, and that such negotiable paper in the hands of an innocent holder for value, who has taken it without notice of any want of authority on the part of the treasurer, is binding on the corporation, although with reference to the corporation it is accommodation paper. *Narragansett Bank v. Atlantic Silk Co.*, 3 Metc. (Mass.) 282; *Bates v. Iron Co.*, 7 Metc. (Mass.) 224; *Fay v. Noble*, 12 Cush. 1; *Lester v. Webb*, 1 Allen. 34; *Bank v. Winchester*, 8 Allen, 109; *Bird v. Daggett*, 97 Mass. 494; *Monument Nat. Bank v. Globe Works* *ubi supra*; *Corcoran v. Cattle Co.*, 151 Mass. 74; 23 N. E. Rep. 727. While it is possible that most if not all, of the cases in which this rule has been stated as law have some special circumstances from which the treasurer's authority could be inferred, and that the court was influenced in the decisions by the well-known fact that in many of the manufacturing corporations of this commonwealth the treasurer not only has the custody of the money, but is the general financial manager, and often the general business manager, of the corporation, the rule itself has been frequently and broadly stated in our decisions, and is well known both to the officers of manufacturing and trading corporations and to those



of banks and financial institutions. It could not now be abrogated or unsettled without disturbing commercial transactions. There are, however, many corporations which transact more or less business to which the rule has been held not to apply. Thus it does not apply to a college (*Webber v. College*, 23 Pick. 302), nor to a parish (*Packard v. Society*, Metc. 10 [Mass.] 427), nor to a monument association (*Torrey v. Association*, 5 Allen, 327), nor to a municipality (*Bank v. Winchester*, 8 Allen, 109), nor to a savings bank (*Tappan v. Bank*, 127 Mass. 107), nor to a horse-railroad company (*Craft v. Railroad Co.*, 150 Mass. 207; 22 N. E. Rep. 920). Upon consideration of the decisions cited, we think it fair to say that the making and indorsing of negotiable paper is to be presumed to be within the power of the treasurer of a manufacturing and trading corporation whenever, from the nature of its ordinary business, as usually conducted, the corporation is naturally to be expected to use its credit in carrying on commercial transactions. Such paper is the usual and ordinary instrument of utilizing credit in commercial transactions, and it is for the interest of the corporation and of the community that the best instrument should be employed. It is no less for the interest of all that, if negotiable paper is to be employed, its validity should not be open to objections which would impair its usefulness by requiring at every step an inquiry into the authority by which it is issued. There are matters of common knowledge pertinent to the present question. Gaslight companies like the defendant are chartered for the purpose of making and selling gas. They are located in every city of the commonwealth, and in most of the larger towns and villages. In the recent development of the use of electricity many electric light or light and power companies have been established where gaslight companies are in operation. The powers, obligations, and business of these electric companies are so similar to those of gaslight companies that they are classed with them in the minds of business men, and are under the supervision of the same state board. We see no reason why, in respect to the present question, all of this general class of corporations should not be governed by one rule. They are all in fact "manufacturing and trading corporations" in the same sense that companies whose business it is to manufacture and sell cottons, woollens, shoes, or paper are manufacturing and trading corporations. None

of these companies are traders in the strict sense contended for by the defendant, since none of them make it their "business to buy merchandise or goods and sell the same." All of them, and the gaslight companies equally with the others named, buy merchandise and goods in large amounts, expend large sums in transforming by their processes of manufacture the articles purchased into other commodities which they sell for the purpose of making a profit. Neither the fact that pipes which a gaslight company uses only to deliver to its customers one of the commodities which it sells, nor that its price for that commodity may be regulated by civil authority, nor that the municipality in which its plant is located may purchase or take its franchise and property, makes it less advantageous or necessary that the gaslight company shall be able to use its credit in its commercial dealings. Although such companies manufacture only as they deliver, and so have no occasion to hold large quantities of manufactured goods for a market, there are features of their business which make it necessary for them to have control of large amounts of money at certain seasons. Coal, their chief raw material, is uniformly at its lowest price in summer, and away from the seaboard is usually taken in in large quantities at that season. Gas is uniformly sold upon time, and the bills collected monthly or quarterly. The work of extending and repairing street mains and other work upon the manufacturing plant can be done to the best advantage during only a portion of the year. A business so conducted affords abundant scope for the advantageous use of the credit of the corporations engaged in it, and they would naturally be expected to use their credit in the transaction of their ordinary business. Their published returns, made to the board of gas commissioners, show that the companies do in fact issue large amounts of promissory notes. It is true that these notes may possibly have been issued under special votes or by-laws or other explicit authority. Upon this point we have no evidence or means of certain knowledge. But it is also true, and is a consideration entitled to weight, that the practice of gaslight companies to issue promissory notes has grown up since the announcement by the court of the rule that trustees of manufacturing companies

light companies and their officers, and those who have received in payment or bought or discounted their promissory notes, have, in so doing, acted upon the assumption that the rule as to the implied authority of treasurers of manufacturing and trading corporations to issue negotiable paper applied to the treasurers of gaslight companies. Those who have occasion to deal directly with such companies, or to purchase or discount their notes in the money market, would naturally assume that the rule so long applied by the court to other manufacturing and trading corporations would be applied to these. In our opinion, the same reasons which required the making of the rule referred to are operative here, and require us to hold that it is to be applied in the case of gas light companies. We do not disregard the fact that such companies have peculiar duties to the public, and peculiar privileges, and that their operations many be regulated by public authority, and their franchises and property taken over by the municipalities in which their works are located. But the situation of such a company with reference to this class of rights and obligations is the same, irrespective of the question whether its treasurer is or is not to be presumed to have power, by virtue of his office, to issue promissory notes. Such notes do not bind the franchises or the property of the company any more than debts upon open account. A majority of the court is therefore of the opinion that the jury was rightly instructed that the treasurer of the defendant corporation, by virtue of his office had authority to sign a note which would bind the corporation.

4. It is not necessary to consider in detail the numerous questions argued by the defendant as to the admission and the exclusion of evidence and the rulings given and refused, bearing upon the status of Mr. Ruggles as the treasurer *de jure* or *de facto* of the corporation, or upon the answers to the special questions propounded by the court and answered by the jury in addition to the general verdict for the plaintiff. Upon the uncontroverted evidence, certain persons claiming to act as the stockholders of the corporation, all of whom were interested in its stock, assembled in its office on the day fixed in its by-laws as the date of its annual stockholders' meeting, and went through the form of holding its annual meeting and of electing him treasurer of the company. The former incumbent of the office resigned it into the hands of Mr. Ruggles, and he has since filled the position of treasurer under a claim of a right to the office,

and without dispute on the part of any stockholder or member of the corporation, and no proceedings have been brought by the corporation itself to test his title to the office. The note in suit was issued when he had thus been in the unquestioned discharge of the functions of the office for nearly three months, and immediately thereafter, at a meeting of which public notice was given, his election was ratified and confirmed. No person in any way interested in the stock, either as a stockholder of record or as a purchaser or pledgee of untransferred certificates, has contested in any way his right to the office. The contention that he is not the lawfully elected treasurer has been made only by the corporation itself, and only as a technical defense to the present suit. Whatever might be the rule to be applied if a stockholder or member of the corporation or the corporation itself had contested the right of Mr. Ruggles in proceedings brought to test the validity of his original election, or of the subsequent ratification, and without holding as to the rules which apply to *de facto* officers of government or of public or *quasi* public corporations, we are of opinion that under such circumstances, the corporation itself cannot be permitted to contend in defense of an action like the present that the acts of a person who, under color of an election to the office, has, without protest or opposition from any source, acted as its treasurer for so long a time, are invalid merely because the annual meeting at which he was chosen was not called in accordance with the by-laws. None of the exceptions relating to this branch of the case are, in view of the uncontroverted facts, material to the question whether the note in suit is a valid cause of action against the corporation, and they are overruled as immaterial.

Exceptions overruled.

FIELD, C. J. (dissenting).—The most important question in this case is whether the instruction of the court is correct that the treasurer of such a corporation as the defendant has authority to sign a promissory note for the corporation by virtue of his office, although the by-laws confer no such authority on him, and he has not been held out by either the stockholders or the directors of the corporation as having any such authority, and has not been knowingly permitted to exercise any such power. The ground on

which certain officers and agents are held, as matter of law, to possess certain implied powers by virtue of the office or employment, is that by a well-known general usage certain powers attach to the office or employment, and the appointment is presumed to have been made with reference to this usage, unless there is notice or knowledge to the contrary. The grounds on which this court has decided that the treasurer of a manufacturing and trading corporation must be taken to have authority to sign promissory notes in behalf of the corporation, unless there is notice or knowledge to the contrary, are stated in the opinion of the majority of the court, but these decisions have been confined to corporations which sell merchandise in the market, although they manufacture the merchandise they sell, and the doctrine has never been extended to such *quasi* public corporations as gaslight companies. In a street-railway corporation, which perhaps affords the nearest analogy, an implied power in the treasurer to sign promissory notes for the corporation has been denied, and treasurers of municipal corporations, and of corporations generally, have no such implied power. Gaslight companies are not commonly known as "trading companies." They do not sell goods, wares, and merchandise in the market. Indeed, they are not commonly called "manufacturing companies." They manufacture and deliver gas to the inhabitants of defined localities, at prices fixed either by public authority or by the companies themselves, subject to public supervision. They may be invested with the right of eminent domain, and subjected to municipal control, and the business may be carried on by towns and cities as well as by private corporations. Their property is mainly in real estate. The income is received at regular times, and, although small in proportion to the value of the plant, is not subject to unforeseen variations in kind or amount. These companies may issue bonds at not less than par, but, unless specially authorized by the legislature, the amount of bonds must not exceed the capital actually paid in (St. 1886, c. 346, § 3); and the property which constitutes the plant is or should be paid for by the capital stock and the proceeds of the bonds. Such companies may sometimes have occasion to borrow money and give promissory notes, but, if well conducted, the occasions cannot be frequent. The word "treasurer," in and of itself, does not import that the person holding that office is the general business manager of the

corporation, but only that he is the person to receive, keep, and disburse the money of the corporation. It was not shown in the present case that treasurers of similar corporations customarily exercise the power of giving promissory notes in behalf of the corporations. Such a power may be given by the by-laws to a treasurer, either alone or jointly with some other officer or officers; but in this case the defendant offered to show that by the by-laws the treasurer "had no power as treasurer to sign notes in behalf of the company," and this evidence was excluded. We know of no custom or usage of which we can judicially take notice that treasurers of such corporations usually have such authority, or usually exercise such a power. We know of no principle of public policy which requires us to hold that the treasurer of such a corporation has impliedly such a power, when he in fact has it not, and has not been held out by the corporation or its directors as having it, and when it does not appear that treasurers of similar corporations have customarily exercised such a power so publicly and uniformly that courts can take judicial notice of it. It is important that corporations should retain the power of controlling their officers. The general rule is that when one person signs the name of another to any contract, whether the other be a natural or artificial person, the authority to do so should be shown, unless the principal has held out such person as having such authority. The instances must be rare when the law will necessarily imply from the name of an office in a corporation authority to sign the name of the corporation to any contract when no such authority has in fact been given or has ever before been exercised with the knowledge of the stockholders or directors of the corporation. There is, generally speaking, no hardship in compelling persons who take promissory notes signed by one person in the name of another to ascertain the authority of the person signing, unless they are content to rely upon an indorser or guarantor. I think the instruction given on this subject was wrong.

ALLEN, J., concurs in this opinion.*

CORPORATIONS. POWER OF TREASURER.

1. Express powers and powers derived from the course of dealing.—The treasurer of a corporation may have powers which are conferred upon him expressly by statute, by the by laws, or by a vote of the directors.

* Reported in 34 N. E. Rep. 1088.

He may have powers which arise from the course of business of the corporation; from his being accustomed to perform certain acts with the knowledge and acquiescence of the directors. In addition to these he has certain powers which are inherent in the office, and which he may exercise in the absence of any express authority or course of business implying such authority. As to the first class, or what may be called the express powers of the treasurer, no question can arise except as to their scope and construction. As these express powers are usually, either such as are implied from the nature of the office itself, or such as ordinarily arise from a course of dealing, or are of a special and peculiar nature, depending upon the particular business of the corporation, or the exigencies of particular emergencies or situations, no general treatment of them is either necessary or possible. Some instances of the construction of express powers are hereafter referred to in connection with analogous cases resting upon implied powers.

As to the powers which exist in the treasurer by virtue of the course of dealing, the general rule undoubtedly is that he will be deemed to have such powers as he has been accustomed to exercise with the knowledge and acquiescence of the board of directors. *Lester v. Webb*, 1 Allen, 34; *Fifth Ward Savings Bank v. First Nat. Bank*, 47 N. J. L. 357; *Fifth Ward Savings Bank v. First Nat. Bank*, 48 N. J. L. 513; *Phillips v. Campbell*, 43 N. Y. 271; *Partridge v. Badger*, 15 Barb. 146; *Bank of Attica v. Potter & Stymus Mfg. Co.*, 1 N. Y. S. 483; *Wahlig v. Standard Pump Mfg. Co.*, 9 N. Y. S. 739; *First Nat. Bank v. Council Bluffs City Water Works*, 9 N. Y. S. 859; *Stark Bank v. U. S. Pottery Co.*, 34 Vt. 144; *Foster v. Ohio-Colorado Reduction & Min. Co.*, 17 Fed. Rep. 130; *Page v. Fall River, etc., R. Co.*, 31 Fed. Rep. 257; *National Cordage Co. v. Pearson Cordage Co.*, (Ct. of App.), 55 Fed. Rep. 812.

It is sometimes said that the corporation is estopped to deny an authority which it has permitted the treasurer to exercise, or which it has held him out as possessing. See *Fifth Ward Savings Bank v. First Nat. Bank*, 47 N. J. L. 357; *S. C. on appeal*, 48 N. J. L. 513. But the decisions proceed upon the basis of an implied grant of authority rather than of an estoppel. The distinction is an important one, because if the principle of estoppel applies, it would be necessary for a party seeking to hold the corporation to show that he knew of and relied upon the course of dealing, which is brought forward as including the transaction in question. But it is held that the party dealing with the corporation through its treasurer, need not have known of the course of dealing relied upon to show authority. This is expressly held in *Bank of Attica v. Potter & Stymus Mfg. Co.*, 1 N. Y. S. 483, and is implied in many of the other cases cited.

Whether there was such a practice or course of dealing as reasonably justified the inference that the treasurer possessed the power claimed is a question of fact to be determined by the jury. *Fifth Ward Savings Bank v. First Nat. Bank*, 47 N. J. L. 357; *S. C. on appeal*, 48 N. J. L. 513; *National Cordage Co. v. Pearson Cordage Co.*, (Ct. of App.), 55 Fed. Rep. 812, and see other cases above cited.

2. Powers of the treasurer by virtue of his office alone.—In *First Nat. Bank v. Council Bluffs City Water Works*, 9 N. Y. S. 859, which concerned

the powers of the treasurer of the defendant company, it is said: "The general principle that the officers of a corporation are special agents, and have only the authority conferred upon them by the by-laws, and that all persons who deal with them are bound to take notice of the extent of their authority, is too well settled to require comment or citation of authorities." But this, is without doubt, too restricted a view of the powers of corporate officers. Each office undoubtedly implies something in the way of powers. Such implication must necessarily be based upon what it has been customary for such officers to perform. It is the universal custom for treasurers of corporations to have the custody of the corporate treasures or funds. The name and office imply one who has such custody. It follows that the treasurer is entitled to receive the payment of moneys due the corporation by virtue of his office alone. *Brown v. Weymouth*, 36 Me. 414; *Dedham Institution for Savings v. Slack*, 6 Cush. 408; *Jackson v. Campbell*, 5 Ward. 571; *Howard v. Ha'ch*, 29 Barb. 297; *Portage County Mut. Ins. Co. v. Wetmore*, 17 Ohio, 380; 17 Am. & Eng. Enclypo. Law, p. 182. In the first of these cases it is said: "The ordinary duties of a treasurer are to receive, safely keep, and disburse, under the supervision of the directors, the funds of the company." It may be doubted whether the implied or inherent powers of the treasurer extend beyond this in any case. We proceed to notice what has been decided on the subject in the following sections.

3. Power to borrow money and to bind the corporation by making, accepting, or indorsing commercial paper for that purpose.—

In the principal case it is held to be the settled law of Massachusetts that the treasurer of a manufacturing or trading corporation "is clothed by virtue of his office with power to act for the corporation in making, accepting, indorsing, issuing, and negotiating promissory notes and bills of exchange, and that such negotiable paper in the hands of an innocent holder for value, who has taken it without notice of any want of authority on the part of the treasurer, is binding on the corporation, although with reference to the corporation it is accommodation paper." Of the cases cited in the opinion, the only ones which can be regarded as going the length of the principal case are *Corcoran v. Snow Cattle Co.*, 151 Mass. 74, and *Narragansett Bank v. Atlantic Silk Co.*, 3 Met. 283. In *Fay v. Noble*, 12 Cush. 1, it was held that one who was general agent and manager, and also treasurer of a trading corporation, might, under his general powers, borrow money for the use of the corporation and give personal security for its payment. In *Lester v. Webb*, 1 Allen, 34, the treasurer was held out as the general agent of the corporation for the management of its fiscal concerns and as authorized to make and indorse negotiable paper. The court says: "The rule is well settled, that if a corporation permit their treasurer to act as their general fiscal agent, and hold him out to the public as having the general authority implied from his official name and character, and by their silence and acquiescence suffer him to draw and accept drafts, and to indorse notes payable to the corporation, they are bound by his acts done within the scope of such implied authority." This same rule is approved and followed in *Page v. Fall River, etc., R. Co.*, 31 Fed Rep. 257.

Outside of Massachusetts the rule is that the treasurer of a corporation has not, by virtue of his office merely, power to bind the corporation as a party to

commercial paper. *Bank of Attica v. Potter & Stymus Mfg. Co.*, 1 N. Y. S. 488; *Wahlig v. Standard Pump Mfg. Co.*, 9 N. Y. S. 739; *First Nat. Bank v. Council Bluffs City Water Works*, 9 N. Y. S. 859; *Fifth Ward Savings Bank v. First Nat. Bank*, 47 N. J. L. 357; S. C. 48 N. J. L. 513; *Stark Bank v. U. S. Pottery Co.*, 34 Vt. 144; *Foster v. Ohio-Colorado Reduction & Min. Co.*, 17 Fed. Rep. 130.

Even in Massachusetts the rule of the principal case is held not to apply to the treasurer of a horse railroad company. *Craft v. South Boston R. Co.*, 150 Mass. 207. Here the treasurer of the defendant company borrowed money, ostensibly for the company, and gave the company's note therefor, but appropriated the money to his own use. It was held that the company was not liable on the note. The court says: "Whatever may be true of trading corporations, there is nothing in the nature of the business of a horse railroad corporation, which implies that the treasurer, by virtue of his office, has authority to borrow money for the company, and to give its notes therefor. It does not appear that the company in anyway held out Reid to the public, or to the plaintiff, as having any such authority, or that treasurers of horse railroad corporations customarily have or exercise any such authority. The action, therefore, cannot be maintained on the note."

Of course, when the treasurer has been in the habit of borrowing money, executing notes, drawing drafts, accepting bills, etc., for the corporation, with the knowledge and sanction of the directors, the corporation will be liable to an innocent holder for value of paper so made, accepted or indorsed, though the same is without consideration or fraudulent as to the corporation. *Credit Co. v. Howe Machine Co.*, 54 Conn. 857; *Bank of Attica v. Potter & Stymus Mfg. Co.*, 1 N. Y. S. 488, *Stark Bank v. U. S. Pottery Co.*, 34 Vt. 144; *Fifth Ward Savings Bank v. First National Bank*, 47 N. J. L. 357; S. C. 48 N. J. L. 513; *Foster v. Ohio Colorado Reduction & Min. Co.*, 17 Fed. Rep. 130.

4. Power to sell the property of the corporation, or to indorse, assign and transfer its securities.—In the absence of authority expressly conferred or implied from the course of business, the treasurer of a corporation has no power to sell its tangible property or to make contracts for future sales. See *Phillips v. Campbell*, 48 N. Y. 271; *National Cord. Co. v. Pearson Cord. Co.*, (Ct. of App.), 55 Fed. Rep. 812. The same rule applies to the commercial paper and securities of the corporation. *Holden v. Upton*, 134 Mass. 177; *Holden v. Hoyt*, 134 Mass. 188; *Holden v. Phelps*, 135 Mass. 61; *Fifth Ward Savings Bank v. First Nat. Bank*, 47 N. J. L. 357; S. C. 48 N. J. L. 513. In *Petkins, Doe & Co. v. Bradley*, 24 Vt. 66, it was held that where a note was made payable to the treasurer of a named corporation, the treasurer had implied authority to indorse and transfer the note. The reasoning of this case goes to the extent of holding that the treasurer of a corporation has power, by virtue of his office, to indorse and transfer negotiable paper belonging to the corporation. The treasurer has no implied authority to assign a mortgage belonging to the corporation. *Jackson v. Campbell*, 5 Wend. 571; *Holden v. Hoyt*, 134 Mass. 181; *Holden v. Phelps*, 135 Mass. 61. In the first of these cases, while the general rule is stated as above, it is held that an assignment of a mortgage executed by the treasurer in due form, and being under the seal of the corporation, will be *presumed* to be valid.

It, of course, follows that negotiable paper or other securities transferred by

the treasurer without authority may be recovered back. See cases already cited in this section.

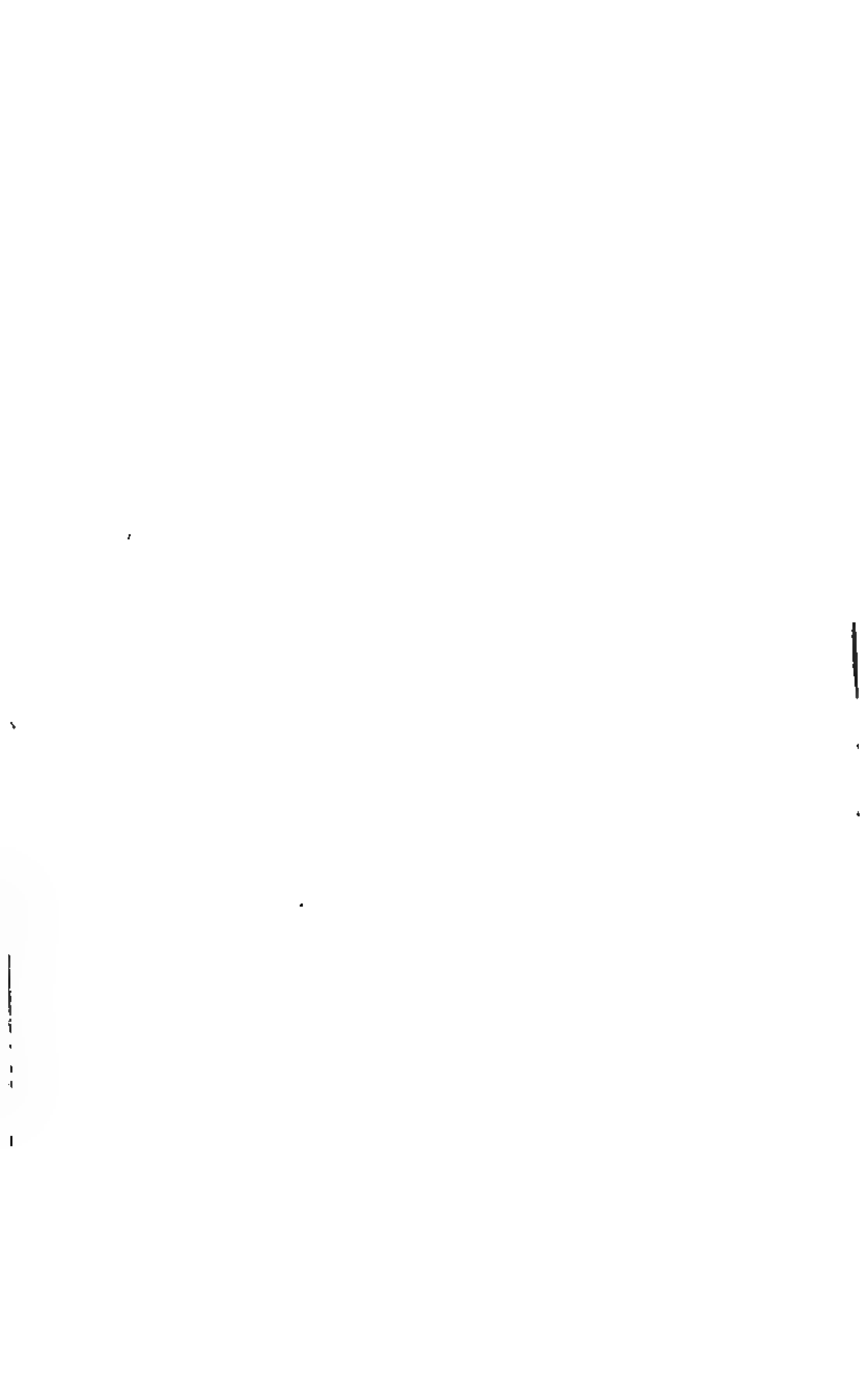
5. Power to pay, release, or compromise debts due the corporation.—The treasurer has no right to pay out moneys without authority, express or implied, from the board of directors, and this applies as well to claims of the treasurer himself as to claims of third parties. *Brown v. Weymouth*, 36 Me. 414; *Peterborough R. Co. v. Wood*, 61 N. H. 418. Nor has the treasurer any power to compromise or release a claim due the corporation. *Dedham Institution for Savings v. Slack*, 6 Cush. 408; *E. Carver Co. v. Manufacturers' Ins. Co.*, 6 Gray, 214; *Moshannon Land and Lumber Co. v. Sloan*, (Pa.), 7 Atl. Rep. 102; *Brown v. Weymouth*, 36 Me. 414. In *Mt. Olivet Cem. Co. v. Shubert*, 2 Head, 116, 120, it was held that the promise of the treasurer of a corporation to pay the assignee of an open account due from the company was presumptively binding on the company, and that the company would be liable thereon unless a want of authority was shown.

6. Power to confess judgment.—The treasurer of a corporation has no power to confess judgment against the corporation. *Stevens v. Carp. Riv. Iron Co.*, 57 Mich. 427; *Stokes v. N. J. Pottery Co.*, 46 N. J. L. 237. Nor does it alter the case that the same person is treasurer, president, and general manager, and the owner of nearly all its capital stock. *Stokes v. N. J. Pottery Co.*, 46 N. J. L. 237.

7. Treasurers of savings banks.—The implied powers of treasurers of savings banks are especially considered in the following cases: *Commonwealth v. Reading Savings Bank*, 133 Mass. 16; *Holden v. Upton*, 134 Mass. 177; *Holden v. Hoyt*, 134 Mass. 181; *Holden v. Phelps*, 135 Mass. 61; *Fifth Ward Savings Bank v. First Nat. Bank*, 47 N. J. L. 357; 48 N. J. L. 518. No different rules or principles apply in such case than in case of other corporations. If any custom or usage gives the treasurers of savings banks more or less power, that would be a question of fact in each particular case.

8. Miscellaneous decisions.—In *Howard v. Hatch*, 29 Barb. 297, suit was brought for the possession of land. The plaintiff derived title through the foreclosure of a mortgage. The mortgage was assigned to Henry Tower, treasurer of Madison University. Tower, acting as such treasurer, foreclosed the mortgage by advertisement and sale, bought the property in his individual capacity and quitclaimed to the plaintiff. There was no proof of the treasurer's authority to make the foreclosure. It was held that, in the absence of all proof on the subject, such authority would be presumed. Authority to a treasurer to execute notes in the regular course of business of the corporation, does not authorize him to give a note assuming the debt of a third person. *Stark Bank v. U. S. Pottery Co.*, 84 Vt. 144. Where a treasurer had authority to buy bonds for the corporation, it was held that this was authority to pay for them, and to agree upon the amount due in payment, and to accept drafts therefor. *Gafford v. Am. Mortgage & Investment Co.*, 77 Iowa, 736; 42 N. W. Rep. 550.

As to the liability of the corporation for frauds of the treasurer see *Pratt v. Taunton Copper Co.*, 123 Mass. 110; *Machinists' Nat. Bank v. Field*, 126 Mass. 345; *Boston & A. R. Co. v. Richardson*, 135 Mass. 473; *Holden v. Phelps*, 141 Mass. 457; *Commonwealth v. Reading Savings Bank*, 137 Mass. 431; *Carroll v. People's R. Co.*, 14 Mo. App. 490.



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tions by a railroad company in favor of another coal shipper, similarly circumstanced as to place and distance, is the amount which the complaining party would have received if he had been allowed the same rebate per ton as the favored shipper. 684.

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In general.

1. Public or *quasi* public corporations, which possess and exercise the right of eminent domain, or its equivalent, owe duties to the public as well as to their stockholders; and they cannot sell or lease their corporate powers and privileges, and thereby disable themselves from performing their public duties, without legislative authority. 620.

2. A contract made by a corporation, which is unlawful and void, because beyond the scope of its corporate powers, does not, by being carried into execution, become lawful and valid. 620.

3. In such cases the proper remedy of the aggrieved party is to disaffirm the contract, and sue to recover as on a *quantum meruit* the value of what the defendant has actually received the benefit of. 620.

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5. Corporations engaged in a public service must serve the public without discrimination or partiality. 644 note.

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Liability with respect to false, fraudulent and irregular certificates of stock.

7. Where the secretary and treasurer of a corporation, who is also its agent for the transfer of stock, and authorized to countersign and issue stock when signed by the president, forges the name of the latter, and fraudulently issues a certificate of stock, the corporation is liable to a bank which has accepted such certificate, in good faith, as security for a loan. 5.

8. The rights of such bank are not affected by the fact that it sold such stock by authority of the person from whom it received it, and after the discovery of the forgery refunded to the purchaser the money paid, and received the certificate back. 5.

9. The president of a company took a blank certificate of stock, signed by a former president, since deceased; dated it back seven years; forged the signature of the then treasurer, also deceased; signed his own name, as the then secretary and transfer agent; and filled in his own name as stockholder. This instrument he used as collateral in obtaining a loan. Held that his office as president clothed him with no such apparent authority as to make the company liable on the certificate. 44.

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24. Remedy of holder of certificate against the corporation and measure of damages. 43 note 15.

What constitutes one a bona fide holder of false and fraudulent certificates.

25. Before accepting a certificate of stock in a corporation, as security for a loan, the president of a bank sent its confidential clerk to the office of the company to ascertain if the certificate was genuine, and the latter was informed by the secretary and treasurer, in charge of the office, that it was genuine. The name of the president of the corporation had been forged to the certificate by the secretary and treasurer, who was associated in business with the holder, all of which was unknown to the bank. Held, that the

bank was a bona fide holder of such certificate. 5.

26. Effect of the words in the certificate that "it is transferable only on the books of the corporation upon surrender of this certificate." 49 note 5.

27. Effect of certificate being issued in name of certifying officer. 51 note 3.

28. Where the false certificates are received directly from the officer issuing them for a consideration moving to him, or in a transaction in which he is known to have a personal interest. 57 note 4.

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See EMINENT DOMAIN.

DAMAGES.

See CARRIERS, 28; RAILROAD COMPANIES, 28-29.

1. Plaintiff was a physician, sixty years old, and earned about \$2,500 a year; his nose and three ribs were broken, and his spine and hip injured; he was permanently paralyzed on one side; some of his teeth were broken and knocked out; and he was an invalid for life, so that his earnings were much reduced. Held, that a verdict for \$10,175 was not excessive. 852.

2. When a strong healthy woman, 30 years old, and earning \$50 a month in addition to performing her own household duties, is injured by the negligence of a street-railway company and made a helpless invalid for life, a verdict for \$15,000 is not excessive. 147.

3. Where an unlawful expulsion from a berth of a sleeping-car is the proximate cause of a married woman's miscarriage, the sleeping car company is liable for such injury, although its servants were ignorant of the woman's condition when they expelled her. 435 note 4.

Death by wrongful act.

4. In determining the amount of damages the jury should consider deceased's age and occupation, the wages he was receiving, the condition of his health, his ability to earn money, and therefrom should determine the probable pecuniary loss to deceased's estate caused by his death. 756.

5. It is proper to refuse an instruction that such sum should be allowed as,

put at interest, would have amounted to the sum deceased would have accumulated and had at the time of his death had he lived his allotted time according to his expectancy of life. 756.

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DIRECTORS AND OFFICERS.

See BOOKS AND RECORDS, 20.

Directors.

1. The directors are the agents of the corporation, not the corporation itself, and although they meet without the limits of the state creating the corporation, yet their proceedings will be valid and binding upon it. 238.

2. A board of directors, empowered to manage and govern the affairs of a corporation, are properly qualified to make an assignment of the property of the corporation for the benefit of creditors, when it is in failing circumstances, without obtaining the sanction of the stockholders. 288.

3. The board of directors of a corporation has the undoubted right to sell property of the corporation to pay its debts. 629 note 2.

Treasurer.

4. The treasurer of a trading or manufacturing corporation is clothed, by virtue of his office, with the power to execute notes in behalf of the corporation, so as to make them binding on it when in the hands of innocent purchasers before maturity. 771.

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6. Express powers of treasurer and powers derived from the course of dealing. 779 note 1.

7. Powers of the treasurer by virtue of his office alone. 780 note 2.

8. Power to borrow money and to bind the corporation by making, accepting or indorsing commercial paper for that purpose. 781 note 3.

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11. Power to confess judgment. 783 note 6.

12. Power of treasurer to foreclose mortgage by advertisement and sale. 783 note 8.

13. Authority to a treasurer to execute notes in the regular course of business of the corporation, does not authorize him to give a note assuming the debt of a third person. 783 note 8.

14. Where a treasurer had authority to buy bonds for the corporation, it was held that this was authority to pay for them, and to agree upon the amount due in payment, and to accept drafts therefor. 783 note 8.

DISCRIMINATION.

See CARRIERS; CORPORATIONS, 5; GAS COMPANIES; IRRIGATION COMPANIES; PATENTS; TELEGRAPH AND TELEPHONE COMPANIES; WATER COMPANIES.

ELECTION.

1. When the stockholders of a corporation, after it has been duly organized within the state of its creation, meet without the limits of the state granting their charter, and elect a board of directors, a creditor who has had voluntary dealings with and otherwise recognized the validity of the corporation cannot object to the legality of such election. 288.

ELECTRICITY.

See RAILROADS IN STREETS; TAXATION.

1. Where an electric light company has, under an authorized contract with a city, expended money in establishing its plant and appliances, it has a vested right to use its wires, which cannot be infringed by another company's stringing interfering wires in the same streets under a subsequent contract with the city. 157.

2. Where the second company in such case strings its wires so close to those of the first company as to inter-

fere with them, and in such a position as to cause danger to the first company's employees, it will be required to pay the damages caused thereby, and will be perpetually enjoined from such interference. 157.

3. Where a telephone company has permission from an electric light company to use the latter's poles and leaves a coil of loose wire on a light pole, it is bound to look after it, and if the light company removes the pole and hangs the wire on a telephone pole where it becomes charged with electricity from an electric light wire, and injures a pedestrian on the sidewalk, the negligence of the telephone company is the proximate cause of the accident. 842.

EMINENT DOMAIN.

See RAILROADS IN STREETS.

Building lines. Taking.

1. Building lines cannot be established without notice and compensation to the owner of property affected. 422.

2. Mapping land into blocks and streets and prohibiting improvements on the parts designated as streets, amounts to a taking, and cannot be done without compensation. 428 note.

Costs.

3. Since the constitution declares that private property shall not be taken for public use without just compensation, where land is condemned for a street, the owner is entitled to recover his necessary costs incurred in making a *bona fide* defense, though the Code provides that in such proceedings "costs may be allowed or not, and, if allowed, may be apportioned between the parties on the same or adverse sides, in the discretion of the court." 88.

4. Whether owner of land taken can be compelled to pay any portion of the cost of proceedings. 98 note.

Highway over railroad,—damages.

5. Where a highway is laid out across a railroad the railroad is entitled to compensation for the fair value of the land taken, subject to its use for railroad purposes. 436.

6. Expense of constructing and maintaining safety appliances as an element of damages. 436.

7. Expense of operating gates as an element of damages. 436.

8. Compensation when highway laid out over railroad track. 445 note.

Compensation.

9. Where the constitution requires compensation to be first made, the giving a right of action to recover it does not satisfy the constitution. 423.

ESTOPPEL.

See FOREIGN CORPORATIONS, 7.

EVIDENCE.

See RAILROAD COMPANIES, 18-21.

1. In a case where the expectation of life is a question for the jury, the mortality tables are admissible in evidence, but are not conclusive; the expectation being affected by the particular circumstances of the case. 875 note 11.

2. In an action to recover for personal injuries received in jumping from a horse car in apprehension of a collision with a train, evidence is admissible of the acts of the passengers and of outcries by them and by-standers. 875 note 11.

3. In an action against a sleeping-car company to recover damages for being unlawfully ejected from a berth, the plaintiff may contradict by parol evidence the recital on his "berth check" as to the berth brought by him. 435 note 5.

4. The conductor of a street car may testify as to his recollection of the number of passengers upon his car at a given time and place, notwithstanding he kept a slip "taken from the register on the car, and left at the company's office, which showed the number of passengers carried on that trip." 40.

FELLOW SERVANTS.

In general

1. The question whether the engineer and fireman of a locomotive are fellow servants, is a question of general law, as to which the federal courts are not controlled by state decisions,

but are free to exercise an independent judgment. 182.

2. In determining the liability of a master to his servant for injuries caused by the negligence of another servant, the question does not turn merely on the matter of subordination and control, but rather on the character of the alleged negligent act. 182.

3. If that act is done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master, irrespective of the gradations of service as between the servants themselves. 182.

4. If the act is not one in the discharge of such positive duty, then there should be some personal wrong on the part of the master before he can be held liable. 182.

5. Positive duties of the master to the servant with respect to which he is liable for negligence, though their performance is entrusted to co-employees. 182.

Who are fellow servants.

6. The foreman of a crew engaged in driving piles for trestles, whose business extends to many trestles and bridges, and who has charge of all the men in the crew, including the trainmen, while actually co-operating with the other men in building and repairing trestles, is a vice principal, for whose negligence while in charge of such crew the company is liable to a member thereof, who is injured thereby. 222.

7. A telegraph operator at a way station, whose duty it is, under the general rules of the railway company, to display signals to prevent one train following another on the same track too closely, is the fellow servant of a locomotive fireman, injured in a collision caused by the operator's neglect of such duty. 238 note 8.

8. The engineer and fireman of a locomotive are fellow servants, though the engine is running detached, and the rules declare that under such circumstances the engineer shall also be regarded as a conductor. 182.

9. Where a section hand was killed by the negligence of his section foreman in leaving a switch open, the company is not liable since the two are fellow servants, though the foreman had power to hire and discharge the men under him. 174.

The question of fellow servants as between the following co-employees.

10. Foreman and laborers under him. 281 note 1.

11. Conductor of train and members of train crew. 281 note 2.

12. Conductor or member of train crew and those employed on or about tracks. 288 note 3.

13. Conductor of one train and employe on another train. 285 note 4.

14. Members of different train crews. 286 note 5.

15. Members of same train crew. 287 note 6.

16. Train hand and car repairers and inspectors. 287 note 7.

FIRES.

See RAILROADS, 5-25.

FIRE WORKS.

See MUNICIPAL CORPORATIONS.

FOREIGN CORPORATIONS.

See BOOKS AND RECORDS, 18; CORPORATION.

1. The acts of a foreign corporation, which has not complied with the requirements of the constitution and laws of the state in relation to such corporation transacting business, owning and disposing of property, and, in case of insolvency, making an assignment of its property for the benefit of creditors, are not void and unenforceable. 238.

2. Transacting business in the state by such noncomplying foreign corporation is a usurpation of power by such corporation, but with the state rests the right to elect whether it will acquiesce in such usurpation, or dispute and prevent it. 238.

3. A corporation duly organized under the laws of another state, and publicly doing business in this state, without having complied with the statutory requirements above referred to, is, until its authority is challenged by the state a *de facto* corporation. 288.

the means by which citizens could procure personal judgments against them, and bring them and their property within the reach of the process and jurisdiction of our courts. 238.

5. Validity of contracts made by foreign corporation before complying with laws of state as to doing business therein. 281 note 2.

6. Where the statutes of a state confer upon an insurance commissioner and absolute discretion to grant or refuse a certificate to do business, to a foreign company, or to revoke such certificate, the courts have no power to control such discretion by mandamus. 288 note 8.

7. Persons claiming to act for a foreign corporation and complying with statute are estopped to deny incorporation. 282 note 5.

FORGED CERTIFICATES.

See CORPORATIONS.

GAS COMPANIES.

See MANDAMUS, 6.

1. A gas company, which possesses and exercises the right to lay its pipes in the public streets, cannot sell, lease, or assign its corporate property, rights and privileges to another gas company without the consent of the legislature, and such a lease is *ultra vires* and void. 620.

2. Where a gas company leases all its property and franchises to another company for a term of years without authority of law, it cannot enforce the contract though the lessee has occupied, but its only remedy is to disaffirm the contract and sue for the property and the reasonable value of its use. 620.

3. A natural gas company, occupying the streets of a town or city with its mains, owes to the owners and occupants of houses abutting on such streets the duty of furnishing them with such gas as they may require, where they make the necessary arrangements to receive it and comply

5. Gas companies not bound to supply gas to one who desires to use it only in case of accident to electric light supplied by another company. 648 note 2.

6. The treasurer of a gas company may, by virtue of his office, bind the corporation by the execution and issue of promissory notes. 771.

IMPUTED NEGLIGENCE.

See NEGLIGENCE.

INDICTMENT.

See TRUST COMBINATIONS, 28.

INJUNCTION.

See TRUST COMBINATIONS, 13-16.

INSPECTION OF BOOKS.

See BOOKS AND RECORDS.

INSURANCE.

See TRUST COMBINATIONS.

1. Under the valued policy act of Nebraska stipulations in a policy of insurance in conflict with any of the provisions of that act are inoperative, and this applies to a provision for the appointment of arbitrators. 115.

2. Meaning of words "totally destroyed" in valued policy act as applied to buildings. 115.

3. Construction and effect of Ohio valued policy act. 120 note.

INTERSTATE COMMERCE.

1. A statute making it a misdemeanor to run a freight train upon any railroad on the Sabbath day is a regulation of internal police, and is not in conflict with the constitution of the United States, even as to freight trains passing through the state from and to adjacent states, and laden exclusively with goods and freight received on board before the trains entered the state, and consigned to points beyond its limits. 385.

2. Validity of state Sunday laws as applied to interstate commerce. 39, note 1.

3. The statute of Maine which makes a ticket for a passage on any

railroad binding on the railroad company for six years from its date, with the right of the holder of the ticket to stop off at usual stopping places as often as he pleases during that period does not apply to interstate traffic. 391 note 2.

4. A state statute requiring officers of railway companies to assign passengers to coaches or compartments set aside for the use of the race to which they belong, is unconstitutional as applied to interstate passengers. 391 note 3.

5. A message sent by telephone from one state into another is commerce between the states, and cannot be prohibited or regulated by injunction in either state against persons or corporations engaged in sending such messages, because they or it do not pay the taxes assessed against it by such state. 391 note 4.

IRRIGATION COMPANIES.

Irrigation companies held to have impressed upon them a public trust—the duty of furnishing water, if water they have, to all those who come within the class or community for whose benefit they have been created. 648 note 4.

LABOR COMBINATIONS.

See TRUST, TRADE AND LABOR COMBINATION.

LIMITATION OF LIABILITY.

See CARRIERS; TELEGRAPH AND TELEPHONE COMPANIES.

MANDAMUS.

See BOOKS AND RECORDS; FOREIGN CORPORATIONS; RAILROADS, 68, 70; STREET RAILROADS, 1, 3.

1. When *mandamus* is resorted to for the purpose of enforcing a private right, the person interested in having the right enforced must be the relator, but where the object is the enforcement of a public right the people are regarded as the real party, and the relator need not show that he has any legal interest in the result. 94.

2. *Mandamus* never lies to enforce the performance of private contracts. 94.

3. The mandatory part of an alternative writ of *mandamus* must conform to the case made by the recitals in such writ, and must not require more to be done than is justified by such recitals. 94.

4. The range of action required of the respondent by an alternative writ of *mandamus* should be clearly, particularly, and explicitly set forth in the mandatory part of such writ. The duty commanded should not be left to indiscriminate outside ascertainment dehors the writ. 94.

5. The granting of a writ of *mandamus* rests largely in the sound discretion of the court, and where it is asked to enforce the performance of a duty to the public the interests of all the people concerned will be regarded, and the writ will be so framed as will best preserve and enforce the rights of all parties. 479.

6. *Mandamus* is the proper remedy to compel a gas company to supply an abutter with gas from its mains. 640.

MASTER AND SERVANT.

See FELLOW SERVANTS.

MUNICIPAL CORPORATIONS.

See EMINENT DOMAIN; RAILROADS IN STREETS.

Abating nuisance. Low lands.

1. The filling up of a low lot which has been declared a public nuisance by the board of health, and ordered to be filled, is not a "local improvement," within the meaning of the tax laws applicable to that subject, but is an exercise of the police power granted to the city council. 73.

2. An act authorizing a city to fill up low lots declared to be nuisances by the board of health, and to recover the cost from the landowner if it does not exceed one-half the value of the lot, is a valid exercise of the police power. 73.

3. Power to abate a nuisance by filling up, draining or cleansing low damp or unwholesome places. 80 note.

Licensed fireworks. Liability for damages.

4. A large display of fireworks held at the junction of two narrow and completely built streets of a large city,

and managed by private persons under no official responsibility, is an unreasonable and dangerous use of the streets, and a public nuisance. 679.

5. Where a city has power to regulate the use of fireworks and the mayor, acting under an ordinance, licences a display where it is a nuisance and damage results, the city will be liable. 679.

Ultra vires acts.

6. Where a municipal corporation, having power or jurisdiction over a subject matter, makes a mistake in the exercise of its powers, and damage results to third persons thereby, it will be liable to make reparation. 679.

7. When liable for acts *ultra vires*. 684 note.

Miscellaneous.

8. The power contained in the charter of St. Louis to establish, license and regulate market places, and to regulate the use of streets does not authorize it to enact an ordinance for the licensing of spaces on a street in front of business houses for produce dealers' stands, such a use being a nuisance to the abutting owners and to the public. 391.

9. An ordinance limiting the speed of railroad trains to six miles an hour within the city limits is reasonable and valid. 352.

10. Amendment of a city charter does not affect existing ordinances not inconsistent therewith. 73.

NEGLIGENCE.

See CARRIERS; CONTRIBUTING NEGLIGENCE; CORPORATIONS, 19; ELECTRICITY; FELLOW SERVANT; RAILROAD COMPANIES; STREET RAILROADS; TELEGRAPH COMPANIES."

1. The capacity of a boy of eleven to exercise care for his safety and whether he exercised due care in the particular case, considering his age, experience, and capacity, are questions of fact for the jury. 60.

2. When negligence is presumed from the fact of injury to a passenger in a car. 291 note.

3. Negligence of driver of vehicle cannot be imputed to occupant of vehicle. 374 note 10.

NEGOTIABLE PAPER.

See DIRECTORS AND OFFICERS; GAS COMPANIES.

1. A note in form as follows: "We promise to pay," etc., and signed "C., Treas.," and "C., Pres.," and with the words "Ridgewood Ice Company" printed across the end, is the personal and individual obligation of the signers." 751.

2. The statute which forbids gas-light companies from issuing bonds in an amount exceeding their capital stock, does not affect the right of such a company to issue notes when necessary in its business. 771.

3. A corporation is liable on one of its notes, in the hands of a *bona fide* purchaser before maturity, where it is signed by an officer authorized generally to give notes in its behalf, though such officer, in signing the particular note in question, exceeded his authority or the powers of the corporation. 771.

NOTICE.

See CARRIERS; CORPORATIONS.

1. The fact that a director in a bank discounting a note is also a director in a corporation, payee of the note, is not sufficient to charge the bank with knowledge of equities between the parties. 751.

2. To charge a bank discounting a note with the knowledge of the president of equities between the parties it is necessary that the knowledge should have come to him in his official capacity, and because of a necessity for him to inquire and know the facts in behalf of the bank. 755 note 2.

3. A corporation is not chargeable with the knowledge nor bound by the acts of one of its officers in a matter in which he acts in behalf of his own interests, and deals with the corporation as a private individual, and in no way represents it in the transaction. 755 note 2.

NUISANCE.

See MUNICIPAL CORPORATION.

PASSENGERS.

See CARRIES; STREET RAILROADS.

PATENT.

The owner of a patented invention, in licensing its use by a corporation, in a service of a public nature, cannot impose restrictions as to the persons who may enjoy the benefit of the service or use of the invention. 650 note.

PLEADING AND PRACTICE.

1. Decisions by the highest court of the state are not "laws" of the state, within the meaning of U. S. Rev. St. § 721, which provides that, in the absence of federal legislation, "the laws of the several states" shall be regarded as rules of decisions in actions of law in the federal courts, in cases where they apply. 182.

2. Where the evidence is conflicting, or of such a character that different conclusions may be reasonably drawn therefrom, the case presents a question of fact for the jury under proper instructions. 127.

3. Though the dismissal of an action may not be warranted on the ground stated in the judgment order, yet, if the record discloses other grounds which, as a matter of law, show that plaintiff was not entitled in any event to recover in the action, a judgment of dismissal may be upheld. 127.

4. Held not an unauthorized invasion of the province of the jury for a trial judge to express his opinion upon the evidence. 657.

5. Counsel cannot be restricted in making inferences from the evidence. 147.

6. When a suit is heard on bill and answer the allegations of fact in the bill that are denied in the answer are to be taken as disproved, and the averments of fact in the answer stand admitted. 528.

PROPERTY.

Property in any determinate object is composed of certain constituent elements, to-wit, the unrestricted right of use, enjoyment and disposal of that object. 422.

PROXIMATE CAUSE.

See RAILROAD COMPANIES, 13-17.

Proximate cause is what leads to and might be expected directly to produce

the injury; that is, such a cause as naturally suggests itself to the mind of a prudent man as likely to cause the accident which produces the damage. 169 note 5.

PUBLIC POLICY.

1. Public policy changes with the changing conditions of the times and it is the public policy of the present which the courts must ascertain and apply. 523.

2. The public policy of a nation is to be determined by its constitution, laws and judicial decisions. 523.

RAILROAD COMPANIES.

See CARRIES; EMINENT DOMAIN; FELLOW SERVANTS; MUNICIPAL CORPORATIONS; RAILROADS IN STREETS; STREET RAILROADS.

I. IN GENERAL.

II. FIRES.

III. ACCIDENTS AT CROSSINGS.

IV. ACCIDENTS IN COUPLING AND UNCOUPLING CARS.

V. STATIONS.

I. IN GENERAL.

1. A statute which renders a railroad company absolutely liable for stock killed or injured by the operation of its cars or engines, irrespective of negligence or the breach of any duty imposed by law, is unconstitutional and void, as denying such company the equal protection of the laws and depriving it of its property without due process of law. 127.

2. Validity of statute requiring railroad companies to build and maintain cattle guards when notified by land owner. 140 note 1.

3. Validity of statute making railroad companies liable for depredations committed by stock passing over or through cattle guards, irrespective of negligence or breach of duty. 140 note 2.

4. Railroad company may be compelled to pay attorney's fee in suits based on failure to fence, etc. 141 note 3.

II. FIRES.

Duty and liability of company.

5. Where a depot with shingle roof is so situated that it is frequently fired by passing trains, and it is proved that the company knew of the combustible material of which the roof was composed, and that it had before been fired by sparks if the company used a spark-throwing locomotive near such a roof, and fired it, the fire would be caused by negligence. 160.

6. Reasonable care requires that railroad companies should avail themselves of the best approved practicable appliances for preventing the escape of fire from locomotives. 167 note 2.

7. The decree of care to be exercised to prevent the escape of fire is proportioned to the danger of inflicting injury at the given time and place. 167 note 2.

8. Negligence may be imputed to a railroad company if it allows combustible material to accumulate along its right of way in such quantity, at such places, and at such seasons as renders it liable to become ignited and cause damage to adjacent property. 168 note 3.

9. Failure to move burning car from vicinity of plaintiff's building may be negligence. 168 note 3.

10. Duty and liability generally. 167 note.

Contributory negligence of plaintiff.

11. A person having property adjacent to a railroad is not bound to keep his property in such a condition as to guard against the negligence of the railroad company, but every person has the right to enjoy his property in the ordinary manner and, he is under no obligation to stand guard over it to protect it from the negligence of a railroad company. 168 note 4.

12. A person has the right to construct buildings on any part of his property, and to enjoy the same, without regard to the proximity of a railroad, and such use of his property cannot be set up as a contributory negligence in an action against the company for negligently setting fire to the buildings. 160; 168 note 4.

Proximate cause.

13. The question of proximate cause in case of fires set by locomotives or

communicated from right of way. 169 note 5.

14. If the fire spreads from the matter first ignited, the intervention of considerable space, or of various physical objects, or a diversity of ownership, does not preclude recovery by the party injured, or affect the company's liability for its first negligent act. 160.

15. Where the fire was communicated to plaintiff's property by the fire from defendant's burning station, which was set on fire by sparks from its locomotive, defendant is liable for the damages to plaintiff's property. 170 note.

16. A fire started by the defendant on its own right of way spread to plaintiff's premises, and plaintiff's cattle wandered into the fire. Held, that the injury to the cattle was a proximate result of the escape of the fire. 170 note.

17. A rise in the wind or a change in its direction, after the fire has started, whereby it is carried to the plaintiff's property, is not such an independent, intervening cause as breaks the continuity between the defendant's negligence and the plaintiff's loss, 170 note.

Evidence.

18. Of plaintiff's title to the property burned and the proof thereby necessary to recovery. 171 note 6.

19. Evidence necessary to make prima facie case. 171 note 7.

20. Sufficiency of proof to make out action or defense—facts in particular cases. 171 note 8.

21. Admissibility of proof of particular facts; other fires and other engines. 173 note 9.

22. Evidence that the right of way and track, at other points in the neighborhood than that at which the fire was set out, were incumbered by dead grass and other combustible material, is admissible. 173 note 9.

Damages. Attorney fees.

23. In an action to recover for the destruction of a grove of trees standing upon a farm, the measure of damages is the value which the trees added to the farm. 174 note 10.

24. In an action for the destruction of property having a market value susceptible of easy proof, plaintiff is entitled, in addition to the value of the

property at the time of its destruction, to interest thereon from that date. 174 note 10.

25. Under the statutes of Kansas allowing the plaintiff a reasonable attorney's fee in such cases it is held that he should demand the same in his petition, and then submit the question to the court or jury trying the case upon its merits. 174 note 10.

III. ACCIDENTS AT CROSSINGS.

Negligence of company.

26. Plaintiff attempted to cross a track in view of an engine which he supposed was a switch engine but which was attached to a mail train running at a prohibited speed. His horse was struck by the engine. The evidence was conflicting as to the giving of the statutory signals. It was held that the question of negligence and contributory negligence were for the jury. 352.

27. It is negligence *per se* for a railroad company to run a train of cars in violation of a city ordinance limiting the rate of speed, and if any one is injured in consequence of such negligence, without fault on his part, he is entitled to recover damages. 367 note 2.

28. An ordinance limiting the speed of trains to four miles an hour held not unreasonable. 367 note 2.

29. Whether the speed at which a train is run over a crossing is negligence is a question for the jury. 366 note 2.

30. Negligence of company in respect to giving signals or warning. 367 note 8.

31. Whether company negligent in not maintaining gates. 368 note 4.

32. Where gates are maintained at a crossing, the public have a right to presume when the gates are open and in the absence of knowledge to the contrary, that there is no danger, and, if there is danger, the fact that the gates are open is evidence of negligence. 369 note 4.

33. Shutting gates so as to prevent plaintiff from clearing the track renders company liable, though plaintiff was negligent in driving onto the track. 629.

34. Two railroads crossed a highway near each other and were provided with gates. Plaintiff's horses were

shut in between the two, became frightened and broke through defendants gates and were injured. Held a question for the jury whether defendant was negligent in not having gates sufficiently strong to ward off restless horses. 639 note 1.

35. A horse was frightened by a gate being lowered upon him and broke a rein, whereby he became unmanageable and upset the wagon, injuring the driver. Held that the breaking of the rein was not the sole proximate cause of the injury, and that the company was liable. 640 note 8.

36. Negligence of company in making a flying switch over crossing. 369 note 5.

37. Failure to give warning of the starting of a train which has stopped on a crossing. 369 note 5.

38. The fact that the crossing where the accident occurred, was a private way is immaterial, where it was commonly used with the knowledge of and without objection from the railroad employes, who had often opened trains standing on the crossing to allow public travel over it. 375 note 11.

39. Injury to passenger crossing track to or from train at station. Duty and liability of company. 319 note.

Contributory negligence of plaintiff.

40. General rule as to contributory negligence in such cases. 370 note 5.

41. Duty to look and listen generally. 370 note 7.

42. Duty when view temporarily obstructed by dust or smoke. 371 note 7.

43. Duty to look and listen how affected by failure to give the usual signals of warning. 371 note 7.

44. One riding in public hack not bound to look or listen. 371 note 7.

45. Whether plaintiff has looked from the right point or has exercised due care is a question for the jury. 372 note 7.

46. Waiting for train to pass and failing to observe approaching train on further track. 372 note 7.

47. Whether plaintiff may rely upon compliance with ordinance as to speed. 372 note 7.

48. A plaintiff administrator is not required, in all cases, to prove affirmatively that his intestate, who has been killed at the intersection of a public

road with a railway, looked or listened for approaching trains. 372 note 7.

49. Though the plaintiff may have been guilty of negligence, if the defendant could, by the exercise of ordinary care, have avoided the mischief which happened the plaintiff's negligence will be no defense. In such case the defendant's failure to exercise ordinary care is the proximate cause of the accident, and the plaintiff's negligence the remote cause. 629.

50. Facts of particular cases in which the question of contributory negligence was held to be for the jury. 372 note 8.

IV. ACCIDENTS IN COUPLING AND UNCOUPLING CARS.

Negligence and liability of company.

51. Injuries to brakemen coupling cars by reason of defective coupling apparatus. 766 note 2.

52. Liability when injury is occasioned by reason of defective track. 767 note 4.

53. Liability when injury results from negligence in operation the engine. 767 note 5.

54. When injury results from cars being loaded with projecting timbers, rails, etc. 768 note 10.

55. Where a brakeman is crushed though the absence of bumpers on the cars he is called upon to couple on a dark night, of the condition of which he could not have previously informed himself, the company is liable. 767 note 8.

56. Where it is the duty of fireman to receive signals from switchmen coupling and uncoupling cars, and to transmit them to the engineer, the railroad company is liable for injuries caused by the fireman's failure to transmit a signal. 767 note 6.

57. Failure to give instructions as to proper mode of coupling and the like. 767 note 7.

58. Failure to make and enforce proper regulations. 768 note 8.

59. Where coupling not in line of plaintiff's employment but he is commanded to act by his superior. 768 note 9.

60. To suddenly and without any warning, and without orders from a brakeman between cars uncoupling them, increase the speed of the cars in negligence. 756.

61. Having different devices for coupling in use at same time, whether negligence. 766 note 1.

Contributory negligence. Rules and waiver of rules.

62. Violating rules of company. 766 note 11.

63. Going between cars to make coupling. 770 note.

64. Walking on track between cars to be coupled. 770 note.

65. Effect of knowledge of defects causing the accident. 770 note.

66. Whether going in between cars, which are moving, to uncouple them, is negligence, is to be determined from all the facts and circumstances surrounding the act. 756.

67. A rule of a railroad company prohibiting the uncoupling of cars by going between them while in motion will be held to have been waived by the company where it was the known custom of employes to uncouple cars while in motion. 756.

68. What will amount to a waiver of rules generally. 766 note.

V. STATIONS.

69. A defendant railroad company, after maintaining a station for several years at a point intermediate two other points, where its line crossed other roads, abandoned such station, and established two others at points equidistant from the two junctions, in order to increase its traffic, and provide greater facilities for the inhabitants of the territory lying between the junctions. Held, that a mandamus would not be granted to compel it to restore the abandoned station. 1.

70. Contracts undertaking to obligate a railroad company to establish its depot exclusively at a particular point are void as against public policy. Such companies should be left free to establish and re-establish their depots wherever the public welfare or wants of the public may inquire. 94.

71. The courts are not authorized by mandamus to so far control a railroad company's discretion in the matter of the location of its depot buildings as to indicate in any case the exact spot of such location. 94.

72. Changing site of depot not an abolishment or disuse of it within statute. 4 note 2.

73. Duties as to establishing, maintaining or restoring station generally. 4 note 1.

RAILROADS IN STREETS.

1. Municipal corporations, when empowered by the legislature to do so, may devote a reasonable portion of the street to the use of a street railway, without making compensation to abutting owners, since such is a proper use of the street. 327.

2. The legislature cannot devote the entire width of the street to railroad purposes, unless compensation is first made to the owner for the taking of his easements, though there may be no special constitutional restriction on the legislature. 327.

3. Distinctions based upon ownership of fee of street as to the right of abutting owner to compensation disapproved. 327.

4. Where a street is already incumbered with two street-railroad tracks, with a line of poles between, and with many electric light, telegraph, and telephone poles on both sides of the street, the construction of a third track will be enjoined. 327.

5. Doctrine that abutting owners are entitled to compensation for an unreasonable use of the street criticized. 339 note 1.

6. Liability of cable railway company for injury to abutting property by change of grade. 341 note 5.

7. The use of a street for an electric railway will not be enjoined because the construction of the track will prevent an abutting owner from loading his drays by standing them at right angles to the sidewalk, such a method obstructing the use of the streets, and being in violation of a city ordinance. 339 note 2.

8. The construction and operation of an electric railway by the overhead wire system in a public street does not impose a new and additional burden on the land of the abutting owner and is not so dangerous to those who reside or do business on a public street as to authorize its restraint by injunction. 339 note 2.

Consent of abutting owners.

9. The consent of abutting owners, not having the fee of street, to the construction of an elevated railroad

therein, is irrevocable after road is built and bars any claim for damages. 739.

10. In the absence of any statutory or constitutional provision requiring it, the consent of abutting owners is not necessary to the construction of a railroad in a street. 748 note.

11. When such consent is required by law no valid right can be acquired without it. 749 note.

12. As to the form in which such consent must be given. 749 note.

13. As to the revocation of consent once given. 749 note.

14. Whether abutting owner may annex conditions to his consent. 749 note.

15. Construction of various statutes requiring consent. 748 note.

16. Whether abutting owner may sell his consent. 750 note.

RESTRAINT OF TRADE.

See TRUST AND TRADE COMBINATIONS.

RULES.

See RAILROAD COMPANIES.

SLEEPING CAR COMPANIES.

1. A sleeping car company is liable for money stolen from a passenger by the porter of the car on which he is traveling. 429.

2. Right of plaintiff in such case to recover for money entrusted to him to defray expenses of one traveling under his care. 429.

3. Liability for loss of money, valuables, etc., of passengers. 434 note 1.

4. Are not common carriers. 435 note 2.

5. Breach of contract for berth; what amounts to and damages. 435 note 3.

6. Injury from falling berth while passenger standing by stove. 435 note 6.

7. A passenger agent who was engaged in selling tickets, both for railroad fare and for sleeping car berths, refused to sell a sleeping car berth to a passenger, on the ground that the latter had not a first-class ticket. Held that he acted as the agent of the railroad company, and the car company was not responsible therefor. 435 note 2.

STATION.

See RAILROADS, 63-72.

STATUTES.

See TRUST AND TRADE COMBINATIONS, 20-25.

1. A legislative act, within the sphere of legislative power, and not an encroachment upon the province of some other department of the government, will be upheld, unless clearly in conflict with some provision of the constitution of the state or nation, or in violation of some private right thereby secured. 127.

2. Where the sections of a statute must be construed together as dependent, and not as independent, provisions, the invalidity of one part invalidates other parts. 127.

STOCK AND STOCKHOLDERS.

See BOOKS AND RECORDS; CORPORATIONS.

1. Right to vote stock held under contract of purchase with corporation not fully performed. 727.

2. Right of majority of stockholders to sell all the property of the corporation and wind up its business. 727; 739 note.

3. Right of majority of stockholders to purchase the corporate property at a public sale ordered by his vote. 727.

4. The stockholders of a corporation, having had knowledge of the action of the directors in directing all its property to be sold and conveyed, and not having taken any steps to condemn or prevent it, will be held to have ratified the execution and delivery of the deed. 629 note 3.

STOCK KILLING.

See RAILROAD COMPANIES, 1-4.

STREET RAILROADS.

See RAILROADS IN STREETS.

Duty to construct and operate lines.

1. The performance of the duties which a street railway company owes to the public to operate its lines in accordance with the provisions of a

city ordinance under which its road was constructed may be enforced by *mandamus*. 479.

2. Duties and liabilities of second company as grantee of property and franchises of original company. 479.

3. Whether construction or operation of line may be compelled by *mandamus*. 486 note.

Ejecting passenger. Transfer checks.

4. Plaintiff entered car of connecting line with a transfer check which the conductor took up. After going a short distance the car was taken off and the conductor disappeared. The driver told plaintiff to take the next passing car, which he did, but was ejected because he had no transfer check and refused to pay fare. Held that these facts showed a *prima facie* right to recover for the expulsion. 487.

5. When passage is continued on a second car, the conductor of the latter is not bound to accept passenger's statement that he has paid for through passage to another conductor and he may be ejected if he refuses to pay fare. 491 note 3.

6. Transfer checks for passage must be used within the time limited. 490 note 1.

7. Right of passenger to ride on fragment of coupon ticket mutilated by conductor on connecting line. 490 note 2.

Accident cases. Duties and liabilities.

8. A charge that a street railroad company is bound to exercise the highest degree of care, prudence, and caution in operating its cars so as to prevent injury to its passengers is proper. 147.

9. Street railway companies are common carriers of passengers, and are liable as other common carriers upon common law principle. 284.

10. Common carriers, for the protection of their passengers, are bound to the exercise of more than ordinary care; they are bound to exercise extraordinary care and the utmost skill, diligence, and human foresight, and are liable for the slightest negligence. 284.

11. In an action by a passenger against a street railway company for personal injuries received by a car running into a wagon on the track,

the fact that the negligence of the driver of the wagon contributed to the injury is no defense. 147.

12. Where a motorman on a street car sees that a man driving a wagon along the track neither looks back nor pays any attention to the ringing of the bell by increasing his speed or attempting to leave the track, it is his duty to bring his car under control, and the company is liable for injuries to the passenger if he continues until it is impossible to stop. 147.

13. What constitutes one a passenger so as to entitle him to the rights of a passenger in case of accident. 376.

14. Whether one attempting to board a moving car at an unusual place and injured in so doing is entitled to be considered a passenger. 376, 383 note.

15. Effect of drivers knowledge of an infant's presence on the car to constitute the latter a passenger. 60.

16. Duty of company with respect to children trespassing on cars. 60.

17. Liability for frightening or pushing a trespassing child from car. 385 note 4.

18. Where a boy attempts to get on the front platform of a horse car, without giving any indication to either the driver or conductor of his intention to become a passenger, and is not seen by either of them, the company is not liable for injuries to such boy, caused by starting the car, in the ordinary manner, just at the time of making such attempt. 72 note.

19. Starting car while plaintiff is in the act of getting on. Negligence and contributory negligence. 384 note 2.

20. The driver of a street car is bound to take more care of an old person than of one in full vigor, and whether starting a car in the usual and ordinary manner, after an old lady has entered it and before she is seated, is negligence, is a question for the jury. 384 note 3.

21. Where a street-railway car is derailed, and a passenger injured thereby, the presumption is that the casualty was due to the negligence of the carrier, and the burden is on it to rebut that presumption. 284.

22. What sufficient to overcome presumption of negligence from derailment. 284.

23. Injury to one driving along track,—failure to have head light or to bring car under control,—negligence

and contributory negligence. 156 note 2.

24. Where one undertakes to cross a street car track with a wagon having a hood over it, confining his view of the track to thirty feet, the failure to lean forward so as to see an approaching car is negligence *per se*. 156 note 1.

Rights as against others using or repairing street.

25. Contractors, under a contract with a city to pave a certain street, have no power to obstruct the passage of street cars during the paving, where the contract gives no such power, and it is shown that such work has been, and can be, done without such interference, and such interference may be prevented by injunction. 320.

26. Obstructing cars and interfering with wires of street railway by moving house along street—rights of railway company. 327 note.

27. Law of the road—whether applicable to vehicles meeting street cars. 157 note 3.

STREETS AND HIGHWAYS.

See ABUTTING OWNERS; EMINENT DOMAIN; RAILROADS IN STREETS; STREET RAILROADS.

STRIKES.

See TRUST, TRADE AND LABOR COMBINATIONS.

SUNDAY.

See INTERSTATE COMMERCE.

TAXATION.

1. An exemption of charitable and religious corporations from certain taxes does not apply to foreign corporations. 283 note 4.

2. Whether water and gas pipes and electric wires are to be considered as real estate or personal property for purposes of taxation. 86 note.

TELEGRAPH AND TELEPHONE COMPANIES.

See INTERSTATE COMMERCE.

1. The telegraph includes the telephone, and statutes relating to the

organization and regulation of telegraph companies are held to apply to telephone companies also. 651 note.

2. Telegraph and Telephone companies are a public agency, subject to legislative regulation in their charges and service, and under a common law obligation to treat the public with impartiality and to afford their services upon reasonable terms and conditions. 648 note 5.

3. The fact that a telephone company is engaged also in some other line of business, such as a messenger service or coupe business, will not justify it in refusing a telephone service to its competitors in the latter business. 650 note.

4. A telegraph company is not obliged to supply a "bucket shop" with market quotations.

5. Where a telegraph company is constituted a common carrier by statute it cannot legally refuse to accept and transmit a message because the person offering will not sign an agreement that such carrier shall not be liable for damages in any case where the claim is not presented, in writing, within 60 days after the message is filed with the company for transmission. 410.

6. Where a telegraph company unlawfully refuses to receive and transmit a message because not written on its blanks and thereby incurs a statutory penalty, the fact that several hours later substantially the same message is offered by the sender, written upon the company's blank, and is sent by the company, does not cure the wrong nor waive the penalty. 410.

7. Right to limit liability for negligence. 421 note 2.

8. Validity of stipulation requiring claims to be presented in writing within a specified time. 421 note 2.

9. Validity of stipulation as to un-repeated messages. 422 note 3.

TREASURER.

See DIRECTORS AND OFFICERS; GAS COMPANIES.

TRUST, TRADE AND LABOR COMBINATIONS.

1. A combination of insurance companies to control rates and commissions held not embraced in Texas anti-trust act. 491.

2. Under the Kansas anti-trust law the word "trade" includes the business of insurance. 514 note 2.

3. A combination of fire insurance companies to fix uniform rates of insurance and agents' commissions, throughout the state cannot be enjoined by the attorney general since the business is not one in which the public has an interest as that of a common carrier or other corporation having the power of eminent domain, or of a dealer in a staple which is a prime necessary of life, nor is it a professional service to which the public is entitled. 491.

4. An association formed by the retail coal dealers of a city for the purpose of controlling the price of coal, and managing the business of the sale of coal, so as to prevent competition in price between members, is an act "injurious to trade and commerce" and illegal, irrespective of whether the prices fixed are reasonable or otherwise. 581.

5. The entering into the agreement of association constituted a conspiracy to commit an act "injurious to trade or commerce" and the raising of the price of coal by the association constituted an overt act in pursuance of the conspiracy, sufficient to sustain a conviction for conspiracy under the penal code, whether the price fixed was unreasonable or injurious to the public interests or not. 581.

6. Retail lumber dealers formed an association by which they agreed not to deal with any wholesaler who should sell direct to consumers where any member of the association was in business. Plaintiff having made such a sale the secretary of the association threatened to send notice to the members. Held not unlawful and no ground for an injunction. 515.

7. An agreement between railroad companies, constituting the Trans-Missouri Freight Association, which had for its object among other things the fixing of the rates to be charged, held to be valid. 523.

8. Whatever the rule formerly was, the passage of the interstate commerce act evinces a public policy favorable to contracts between carriers which impose only reasonable restrictions upon competition and traffic, and such contracts are void only when they unreasonably restrict competition. 523.

9. Agreement among the manufacturers of an article by which one closes his factory in consideration of a percentage on sales by the others, held illegal. 596 note 4.

10. When employees enter into a combination, made legal by statute, to secure an eight-hour day without reduction of wages, and join in a strike for that purpose, a combination of employers to resist such demand by proper means is not unlawful. 610.

11. Certain stenographers of Chicago formed an association to fix prices and prevent competition among members. Held an illegal combination, and that the courts would not enforce rules or any obligations founded thereon. 592 note 2.

12. An agreement between producers or traders to prevent competition and control prices is illegal and void. 594 note 3; 596 note 3; 598 note 7.

Boycotts, strikes, etc. Remedy by injunction.

13. Power of federal court to enjoin boycott of railroad and interference with interstate commerce. 599 note 8.

14. When the engineers of a railroad have gone out on a strike a court of equity may enjoin connecting roads and their employees from refusing to receive freight from, or to deliver freight to, the plaintiff road. 599 note 8.

15. In such case engineers on the connecting roads may quit their employment without being guilty of contempt, but otherwise if they remain in their employment and refuse to handle such freight. 603 note.

Trades unions and their members may be restrained from preventing the employment of non-union men by force, threats, intimidation, etc. 606 note 9.

17. The fact that members of a combination, otherwise lawful, threaten to withdraw their trade from those who will not accede to their requests, does not make them guilty of using unlawful or criminal means to effect their purpose or render their combination illegal. 610.

18. Threatening to withdraw trade is not an unlawful coercion. 610.

19. Any man (unless under contract obligation, or unless his employment charges him with some public duty)

has a right to refuse to work for or deal with any man or class of men, as he sees fit; and this right, which one man may exercise singly, any number may agree to exercise jointly. 515.

Anti-trust acts.

20. Principles of construction to be applied to the federal anti-trust law. 528.

21. The contracts and combinations intended by the federal anti-trust act are such as were illegal at common law. 528.

22. The federal anti-trust act includes labor combinations within its scope. 607 note.

23. Sufficiency of indictment under federal anti-trust law. 609 note 10.

24. The Texas anti-trust act is not a nullity for failure to expressly declare trusts unlawful, nor the acts constituting a trust punishable, nor any act a violation of its provisions, such declarations being clearly implied. 491.

25. Validity of statute requiring officer or agent of corporation to make disclosure as to whether such corporation has entered into an unlawful combination. 609 note 11.

Miscellaneous.

26. In the examination of a contract alleged to be in restraint of trade and in violation of the anti-trust law, fraud and illegality are not to be presumed. 528.

27. In an action for goods sold and delivered it was pleaded in defense that the plaintiff was a member of a trust combination and acted as its agent in selling the goods. The plea was held insufficient. 598 note 6.

28. Whether bill will lie by attorney general to restrain a corporation from leasing its property to another corporation when its effect would be to partially destroy competition in the production and sale of coal. 598 note 7.

29. Contracts imposing reasonable restrictions upon competition and trade are not against public policy. 528.

30. The quasi public character of railroad corporations does not exclude them from the operation of this rule. 521.

ULTRA VIRES.

See MUNICIPAL CORPORATIONS.

WATER SUPPLY COMPANIES.

1. The water pipes, hydrants and conduits of a water company, laid through the streets of a city or town, are taxable as real estate to the company in possession of them, under statute of Maine, in the city or town where they are laid. 80.

2. Corporations organized for the purpose of supplying the inhabitants of cities and towns with water are bound to be impartial and reasonable in their dealings with the public. 648 note 8.

